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TRANSCRIPT OF RECORD

795431
Sup. Ct

Supreme Court of the United States

OCTOBER TERM, 1947

No. 54

HARRY BLUMENTHAL, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

No. 55

LAWRENCE B. GOLDSMITH, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

No. 56

SAMUEL S. WEISS, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

No. 57

ALBERT FEIGENBAUM, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 26, 1947.

CERTIORARI GRANTED MAY 5, 1947.

No. 11232

United States
Circuit Court of Appeals

For the Ninth Circuit.

HARRY BLUMENTHAL, LOUIS ABEL,
LAWRENCE B. GOLDSMITH, SAMUEL
S. WEISS and ALBERT FEIGENBAUM,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Upon Appeals from the District Court of the United States
for the Northern District of California,
Southern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Northern District of California,

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San Francisco, California.

Attorney for Plaintiff and Appellee.

In the Southern Division of the United States District Court for the Northern District of California.

No. 29238-G

(Title 18 U. S. C. Section 88)

INDICTMENT

In the November, 1944, term of said Division of said District Court, the Grand Jurors on their oaths present: That Harry Blumenthal, Louis Abel, Lawrence B. Goldsmith, Samuel S. Weiss, and Albert Feigenbaum, (hereinafter called "said defendants") at a time and place to said Grand Jurors unknown, did knowingly, wilfully, unlawfully, corruptly, and feloniously conspire, combine, confederate, arrange, and agree together and with divers other persons, whose names are to the Grand Jurors unknown, to commit offenses against the United States of America and the laws thereof, the offenses being to knowingly, wilfully and unlawfully sell at wholesale certain distilled spirits, to-wit, Old Mr. Boston Rocking Chair Whiskey, in excess of and higher than the maximum price established by law, said maximum price at wholesale then and there being not in excess of \$25.27 per case of twelve bottles, each of said twelve bottles containing one-fifth of one gallon of said Old Mr. Boston Rocking Chair Whiskey, in violation of Sections 902 (a), 904 (a), and 925 (b) of Title 50 U.S.C.A. App., and Office of Price Administration Regulations: Maximum Price [1*] Regulation 193 and Maximum Price Regulation 445.

*Page numbering appearing at foot of page of original certified Transcript.

And the said Grand Jurors, upon their oaths aforesaid, do further charge and present: That in pursuance of, and in furtherance of, in execution of, and for the purpose of carrying out, and to effect the object and design and purposes of said conspiracy, combination, confederation, and agreement aforesaid, the hereinafter named defendants did, at the times hereinafter set forth, commit the following overt acts within the Southern Division of the Northern District of California and within the jurisdiction of this Court:

(1) That on or about the 9th day of December, 1943, at the City and County of San Francisco, State of California, said defendant Harry Blumenthal sold to one Herman Fingerhut 100 cases of Old Mr. Boston Rocking Chair Whiskey;

(2) That on or about the 9th day of December, 1943, at the City and County of San Francisco, State of California, the said defendant Harry Blumenthal sold to one Walter Travis 100 cases of Old Mr. Boston Rocking Chair Whiskey;

(3) That on or about the 10th day of December, 1943, at the City and County of San Francisco, State of California, said defendant Albert Feigenbaum accepted from one H. L. Taylor and one R. C. Humes a check payable to the Francisco Distributing Company in the sum of \$4,900.00;

(4) That on or about the 16th day of December, 1943, at the City and County of San Francisco, State of California, said defendant Harry Blumen-

thal accepted from one James Cernusco a check payable to the order of Francisco Distributing Company in the amount of \$2,000.00;

(5) That on or about the 20th day of December, 1943, at the City and County of San Francisco, State of California, said defendant Samuel S. Weiss did give instructions to one Jeremiah D. Higgins and others relating to the unloading of one freight car, Penn. R. R. Number 568500, which said freight car contained 2,076 cases [2] of Old Mr. Boston Rocking Chair Whiskey;

(6) That on or about the 23rd day of December, 1943, at the City and County of San Francisco, State of California, said defendant Albert Feigenbaum transferred to one H. L. Taylor a check in the amount of \$2,450.00;

(7) That on or about the 23rd day of December, 1943, at the City and County of San Francisco, State of California, the said defendants Samuel S. Weiss and Lawrence B. Goldsmith did ship, and cause to be shipped, 100 cases of Old Mr. Boston Rocking Chair Whiskey to H. L. Taylor and R. C. Humes;

(8) That on or about the 23rd day of December, 1943, at the City and County of San Francisco, State of California, said defendant Samuel S. Weiss sold to one Victor Figone 200 cases of Old Mr. Boston Rocking Chair Whiskey;

(9) That on or about the 10th day of January, 1944, at the City and County of San Francisco, State

of California, the said defendants Lawrence B. Goldsmith and Samuel S. Weiss completed and delivered to one John Giometti Invoice Number 10171 of the Francisco Distributing Company;

(10) That on or about the 5th day of January, 1944, at the City and County of San Francisco, State of California, said defendants Samuel S. Weiss and Lawrence B. Goldsmith shipped 25 cases of Old Mr. Boston Rocking Chair Whiskey to Herman Fingerhut at Vallejo, California.

(Signed) FRANK J. HENNESSY

United States Attorney.

[Endorsed]: A true bill, D. Bosschart, Foreman. Presented in Open Court and Ordered Filed Feb. 21, 1945. C. W. Calbreath, Clerk. By J. P. Welsh, Deputy Clerk. [3]

District Court of the United States, Northern District of California, Southern Division.

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 28th day of February, in the year of our Lord one thousand nine hundred and forty-five.

Present: The Honorable A. F. St. Sure,
District Judge.

No. 29238

UNITED STATES OF AMERICA,

vs.

HARRY BLUMENTHAL, et al.

**ARRAIGNMENT—BLUMENTHAL, GOLD-
SMITH AND FEIGENBAUM**

This case came on regularly this day for arraignment. The defendants were present in proper person and with their respective attorneys; viz: Morris Oppenheim, Esq., for defendant Harry Blumenthal; Walter Duane, Esq., and Arthur Dunne, Esq., for defendant Lawrence B. Goldsmith; and Leo Friedman, Esq., for defendant Albert Feigenbaum. Reynold H. Colvin, Esq., Assistant United States Attorney, was present on behalf of the United States.

On motion of Mr. Colvin, the defendants were called for arraignment. The defendants were informed of the return of the Indictment by the United States Grand Jury, and asked if they were the persons, among others, named therein, and upon their answer that they were, and that their true names were as charged, said defendants were informed of the charges against them and stated that they understood the same. [4] Counsel for defendants waived the reading of the Indictment.

After hearing the attorneys, it is ordered that this case be continued to March 12, 1945, at 11 a. m., to plead.

District Court of the United States, Northern District of California, Southern Division:

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Friday, the 2nd day of March, in the year of our Lord one thousand nine hundred and forty-five.

Present: The Honorable A. F. St. Sure,
District Judge.

No. 29238

UNITED STATES OF AMERICA,

vs.

LEWIS ABEL and SAMUEL S. WEISS

ARRAIGNMENT—ABEL AND WEISS

This case came on regularly this day for arraignment. The defendants were present with their respective attorneys: J. V. Lewis, Esq., for defendant Samuel S. Weiss; and Harry Wolff, Esq., for defendant Lewis Abel. James T. Davis, Esq., Assistant United States Attorney, was present on behalf of the United States.

The defendants were called for arraignment. Defendants were informed of the return of the Indictment by the United States Grand Jury, and asked if they were the persons named therein, and upon their answer that they were, and defendant Abel stating that his true name is Lewis (not

Louis); said defendants were informed of the charges against them and stated that they understood the same.

After hearing the attorneys, it is ordered that this case be continued to March 12, 1944, at 11 a. m., to plead. [6]

[Title of Court and Cause.]

DEMURRER

Comes now defendant Lewis Abel, charged in the indictment as Louis Abel, and demurs to said indictment on the following grounds:

I.

That said indictment does not state a public offense against said defendant.

II.

That said indictment is indefinite, uncertain and ambiguous in that this defendant is not advised of the charges he is called upon to meet on said indictment.

Whereas, defendant Lewis Abel, charged in said indictment as Louis Abel, prays that the indictment herein be quashed, and that he be discharged and allowed to go hence without day.

HARRY K. WOLFF

Attorney for Lewis Abel, charged in the indictment as Louis Abel.

CERTIFICATE

I, Harry K. Wolff, attorney for the ~~forenamed~~ defendant, do hereby certify that the foregoing Demurrer is filed in good faith and not for the purpose of delay, and in my opinion is well taken in law.

Dated: March 10th, 1945.

HARRY K. WOLFF

Attorney for Lewis Abel (charged in the indictment as Louis Abel)

(Here follows "Points and Authorities in Support of Foregoing Demurrer.")

(Acknowledgment of receipt of copy.)

[Endorsed]: Filed Mar. 10, 1945. [7]

District Court of the United States, Northern District of California, Southern Division.

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 12th day of March, in the year of our Lord one thousand nine hundred and forty-five.

Present: The Honorable A. F. St. Sure,
District Judge.

No. 29238

UNITED STATES OF AMERICA,

vs.

**LAWRENCE B. GOLDSMITH and ALBERT
FEIGENBAUM.**

**DEFENDANTS GOLDSMITH AND FEIGEN-
BAUM EACH PLEADED "NOT GUILTY"
TO INDICTMENT.**

This case came on regularly this day for entry of plea. The defendants Lawrence B. Goldsmith and Albert Feigenbaum were present in proper person and with their attorneys, Leo Friedman, Esq., and Arthur Dunne, Esq. Reynold H. Colvin, Esq., Assistant United States Attorney, was present on behalf of the United States.

The defendants were called to plead and thereupon each defendant pleaded "Not Guilty" to the Indictment filed herein against him, which said pleas were ordered entered.

After hearing the attorneys, it is ordered that this case be continued to May 8, 1945, for trial (Jury) [8]

[Title of Court and Cause.]

**DEMURRER TO INDICTMENT OF DEFEND-
ANT HARRY BLUMENTHAL**

Now comes Harry Blumenthal, one of the Defendants named in the indictment presented and

filed in the cause entitled and numbered as above, and demurs to the indictment aforesaid, and says that the matters and things in said indictment alleged and appearing are insufficient in law to require this defendant to answer or plead thereto, for each of the following reasons, to-wit:

I.

That the said indictment does not charge this defendant with any crime or offense against the United States of America.

II.

That the said indictment does not state facts sufficient to charge this defendant with having conspired to commit any crime or offense against the United States of America, for all and singular the reasons which in the Memorandum of Points and Authorities in support of this demurrer which are hereunto [9] annexed and made a part hereof fully and at large appear.

III.

That the said indictment is bad for uncertainty in each of the following particulars, to-wit:

(1) It is alleged in the said indictment that the defendants unlawfully conspired and confederated to commit offenses against the United States and the laws thereof, the offenses being to knowingly, wilfully and unlawfully sell at wholesale certain distilled spirits, to-wit, Old Mr. Boston Rocking Chair Whiskey, in excess of and higher than the maximum price established by law, said

maximum price at wholesale then and there being not in excess of \$25.27 per case of twelve bottles, but it is not alleged in said indictment and cannot be ascertained therefrom how or in ~~what~~ manner or by virtue of what provision of law such sale was or would or could have been a violation of any law, or was, ~~or~~ could have been a violation of any penal statute, or was or could have been an offense against the United States.

(2) That it is not alleged in said indictment and cannot be ascertained therefrom how or in what manner the act or acts which said indictment alleges that the defendants therein named conspired to do were or could have been a violation of Sections 902 (a), 904 (a), and 925 (b) of Title 50 U. S. C. A., or of any provision of any of said sections.

(3) That it is not alleged in said indictment and cannot be ascertained therefrom how or in what manner any act or acts which said indictment alleges as aforesaid that the said defendants conspired to do was in violation of maximum price regulation 193, or maximum price regulation 445, neither can it be ascertained therefrom what provision of either of said regulations fixed or established at the time of the formation of said alleged conspiracy, or at any other time, any maximum price for the sale [10] of said whiskey at wholesale, or whether any regulation of the Price Administrator of the United States fixed any maximum price for the sale at wholesale of said whiskey, nor can it be ascertained from said indictment how or in what manner or by virtue of what provision of any price regulation

said maximum price of said whiskey at wholesale as alleged in said indictment is computed or ascertained or arrived at; nor can it be ascertained from an examination or reading of either of said price regulations that any maximum wholesale price for said whiskey has ever been fixed or determined by the Price Administrator.

(4) That it can not be ascertained from said Indictment when or where the said alleged conspiracy was entered into, by reason whereof it is impossible to ascertain or determine from said Indictment whether or not the agreement which said Indictment alleges was entered into by the defendants had for its object the doing of any act or acts which were at the time contrary to any law of the United States.

(5) That it can not be ascertained from said Indictment whether the Emergency Price Control Act was in effect when the defendants named in said Indictment entered into the said alleged conspiracy or agreement.

(6) That it can not be ascertained therefrom whether Maximum Price Regulation 193 was in effect at the time that the defendants in said Indictment named are alleged to have arranged and agreed to sell the whiskey therein mentioned at the price mentioned therein.

(7) That it can not be ascertained from said Indictment whether Maximum Price Regulation 445 was in existence or effect at the time said defendants are alleged to have entered into said agreement or arrangement.

(8) That by reason of the aforesaid uncertainties in the said indictment, this defendant is unable to answer the same or [11] to prepare his defense thereto, or to plead an acquittal thereof as a bar to a subsequent prosecution because of the matters and things therein alleged.

IV.

That this honorable Court has no jurisdiction in this cause, for the reason that the Emergency Price Control Act of 1942, 50 U.S.C.A. Appendix, is void because it is repugnant to and in violation of the Constitution of the United States for the following reasons, among others, to-wit:

(a) That the said Act is an invalid and unconstitutional delegation of legislative powers which may be exercised by the Congress of the United States alone, to an administrative officer, to-wit: the Price Administrator;

(b) That the said Act is an invalid and unconstitutional delegation by Congress to the said Price Administrator of the judicial power of the United States which may be constitutionally exercised by the Courts of the United States alone;

(c) That the said Emergency Price Control Act violates and is repugnant to the provision of the Fifth Amendment to the Constitution of the United States that "No person . . . shall be . . . deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation;

(d) That said Emergency Price Control Act

violates and is repugnant to the provision of the Tenth Amendment to the Constitution of the United States, that "The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively or to the People." [12]

* * * *

Wherefore, defendant Harry Blumenthal prays that this, his Demurrer to the said Indictment, be sustained, and that he go hence without day.

MORRIS OPPENHEIM

Attorney for Defendant Harry
Blumenthal.

(Here follows "Memorandum of Points and Authorities in Support of Demurrer to Indictment.")

[Endorsed]: Filed Mar. 12, 1945.

[Title of Court and Cause.]

MOTION OF DEFENDANT HARRY BLUMENTHAL TO QUASH INDICTMENT

To the Honorable Judges of the Southern Division
of the United States District Court for the
Northern District of California:

Now comes Harry Blumenthal, one of the defendants in the above entitled cause, and moves this Honorable Court that the indictment on file herein be quashed, set aside and held for naught for each of the following reasons, to-wit:

I.

That said indictment, as appears upon the face

thereof, is based upon section 88 of Title 18, U. S. C. A., and purports to be for the offense of conspiracy to commit offenses against the United States within the purview of the section entitled aforesaid, and that it further appears from the face of said indictment that the defendants therein named are charged therein with conspiring to violate the provisions of sections 904 (a) and 925 (b) of Title 50 U.S.C.A. Appendix and Office of Price Administration Regulations, Maximum Price Regulation 193 and Maximum Price Regulation 445, and that a conspiracy to violate section 904 (a) and section 925 (b) aforesaid or to violate either of the Maximum Price Regulations aforesaid is not punishable as a conspiracy under the provisions of section 88, Title 18, U.S.C.A.

II.

That a conspiracy to violate any maximum price regulation issued or adopted or imposed by the Price Administrator pursuant to the authority conferred upon the Price Administrator by section 902 (a) of Title 50 U.S.C.A. Appendix is punishable, if at all, solely under and by virtue of sections 904 (a) and 925 (b) of the Title last aforesaid, and is punishable solely as a misdemeanor. [14]

III.

That section 904 (a) of the said Emergency Price Control Act provides as follows:

“It shall be unlawful, regardless of any contract, agreement, lease or other obligation heretofore or hereafter entered into, for any person

to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2 (section 902 of this Appendix), or of any price schedule effective in accordance with the provisions of section 206 (section 926 of this Appendix), or of any regulation, order, or requirement under section 202 (b) or section 205 (f) [sections 922(b) or 925 (f) of this Appendix], or to offer, solicit, attempt or agree to do any of the foregoing;

that by reason of the aforesaid provision of said Emergency Price Control Act, a conspiracy to violate any regulation or price schedule such as is alleged in the said indictment is specifically punishable under the provisions of section 904 (a).

IV.

That section 925 (b) of said Act provides:

“Any person who wilfully violates any provision of section 4 of this Act [section 904 of this Appendix] and any person who makes any statement or entry false in any material respect in any document or report required to be kept or filed under section 2 or section 202 [sections 902 or 922 of this Appendix], shall, upon conviction thereof, be subject to a fine of not more than five thousand dollars, or to imprisonment for not more than two years in

the case of a violation of section 4 (c) [section 904 (c) of this Appendix], and for not more than one year in all other cases, or to both such fine and imprisonment;”

and that by reason of the section last aforesaid a person conspiring to violate a maximum price regulation is guilty of a misdemeanor only, whereas under the provisions of ~~the~~ general conspiracy statute, 18 U.S.C.A., section 88, upon which this Indictment is based, one convicted thereof is guilty of a felony and subject to imprisonment for a maximum period of two years.

V.

That by reason of the premises, this defendant is not subject to prosecution under the provisions of section 18 U.S.C.A., [15] section 88, but only under the provisions of U.S.C.A. Title 50, section 925 (b):

Wherefore, said defendant prays that this Motion be granted, and that he go hence without day.

Dated this 12th day of March 1945.

MORRIS OPPENHEIM

Attorney for Defendant Harry
Blumenthal.

(Here follows “Points and Authorities in Support of Motion to Quash”, and “Notice of Motion to Quash Indictment”,) and

(Acknowledgment of receipt of service.)

[Endorsed]: Filed Mar. 12, 1945. [16]

District Court of the United States Northern
District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Thursday, the 29th day of March, in the year of our Lord one thousand nine hundred and forty-five.

Present: The Honorable Michael J. Roche, District Judge, sitting for and on behalf of Honorable A. F. St. Sure, District Judge.

No. 29238.

UNITED STATES OF AMERICA,

vs.

HARRY BLUMENTHAL, et al.

Order Continuing Case to April 2, 1945 for Hearing on Demurrers to Indictment and for Entry of Pleas.

This case came on regularly this day for hearing on demurrers to indictment and for entry of pleas of defendants, whereupon on motion of Reynolds H. Colvin, Esq., Assistant United States Attorney, it is ordered that said matter be continued to April 2, 1945. [17]

District Court of the United States, Northern District of California, Southern Division.

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 2nd day of April, in the year of our Lord one thousand nine hundred and forty-five.

Present: The Honorable A. F. St. Sure,
District Judge.

[Title of Cause.]

Order Overruling Demurrer of Blumenthal & Abel,
Denying Motions to Quash Indictment. Defendant Blumenthal Pleaded "Not Guilty".

This case came on regularly this day for hearing on the demurrers and motions of defendants Harry Blumenthal and Lewis Abel to quash the Indictment herein. After hearing Mr. Oppenheim and Mr. Wolff, attorneys for defendants, it is Ordered that the demurrers be overruled and that the motions to quash be denied.

Thereupon the defendant Harry Blumenthal was called to plead. Said defendant pleaded "Not Guilty" to the Indictment, which said plea was ordered entered. Said defendant demanded a trial by jury, and after hearing the attorneys, it is ordered that trial be set for May 8, 1945.

The defendant Lewis Abel not being present, it is ordered that this case be continued to April 4, 1945, for entry of plea of said defendant. [18]

District Court of the United States, Northern District of California, Southern Division.

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 4th day of April, in the year of our Lord one thousand nine hundred and forty-five.

Present: The Honorable A. F. St. Sure,
District Judge.

No. 29238

UNITED STATES OF AMERICA,

vs.

LOUIS ABEL.

DEFENDANT ABEL PLEADED "NOT
GUILTY"

This case came on regularly this day for entry of plea. The defendant, Louis Abel, was present in proper person and with his attorney, Harry K. Wolfer, Esq. Reynold H. Colvin, Esq., Assistant United States Attorney, was present on behalf of the United States.

The defendant was called to plead and thereupon said defendant pleaded "Not Guilty" to the Indictment filed herein against him, which said plea was ordered entered.

After hearing the attorneys, it is ordered that the trial of this case be set for May 8th, 1945. (Jury) [19]

District Court of the United States Northern District of California, Southern Division.

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 7th day of May, in the year of our Lord one thousand nine hundred and forty-five.

Present: The Honorable Louis E. Goodman,
District Judge.

No. 29238-G

UNITED STATES OF AMERICA,

vs.

HARRY BLUMENTHAL, et al.

ORDER CONTINUING TRIAL TO MAY 15, 1945

It appearing to the Court that it will be unable to try this case on May 10, 1945, it is ordered that this case be continued to May 15, 1945, at 10 a. m., for trial. (Jury) [20]

District Court of the United States, Northern District of California, Southern Division.

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 15th day of May, in the year of our Lord one thousand nine hundred and forty-five.

Present: The Honorable Louis E. Goodman,
District Judge.

[Title of Cause.]

MINUTES OF TRIAL

This case came on regularly this day for trial. Reynold H. Colvin, Esq., and James T. Davis, Esq., Assistant United States Attorneys, were present on behalf of the United States. Defendant Harry Blumenthal was present with his attorneys, Morris Oppenheim, Esq., and Thos. J. Riordan, Esq. Defendant Lewis Abel was present with his attorneys, Harry K. Wolff, Esq., and Sol A. Abrams, Esq. Lawrence B. Goldsmith was present with his attorneys, Arthur B. Dunne, Esq., and Walter Duané, Esq. Samuel S. Weiss was present and informed the Court that he would represent himself. Defendant Albert Feigenbaum was present with his attorney, Leo Friedman, Esq.

Thereupon the following persons, viz: [21] Mrs. Virginia Davidson, Mary K. Phelan, Jefferson A. Beaver, Boris M. Sutter, Miss Margaret Keily,

Martha A. Herman, Charles A. Jensen, Maurice M. Cohen, Ethel L. Fairbairn, Virginia J. Faldetta, Evangeline D. Exley, Sarah M. Falconer, twelve good and lawful jurors, were, after being duly examined under oath, accepted and sworn to try the issues joined herein. Mr. Colvin made a statement to the Court and jury on behalf of the United States. Almon C. Jones, Robert Otis Grubbs and Fred A. Sander were sworn and testified on behalf of the United States. Mr. Colvin introduced in evidence and filed U. S. Exhibits Nos. 1, 2, 3, 7, 8, 9, 10, 11, 12, 13, 14; and introduced U. S. Exhibits Nos. 4, 5 and 6 for identification. The hour of adjournment having arrived, the Court, after admonishing the jury, ordered that the further trial of this case be continued to May 16, 1945, at 1 p. m. [22]

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 16th day of May, in the year of our Lord one thousand nine hundred and forty-five.

Present: The Honorable Louis E. Goodman,
District Judge.

[Title of Cause.]

MINUTES OF TRIAL. DEFENDANT LEWIS
ABEL FINED \$50.00 FOR CONTEMPT OF
COURT.

The jury heretofore impaneled and the parties hereto being present as heretofore, with the exception of the defendant Lewis Abel, the Court took a recess while awaiting the appearance of defendant Lewis Abel. Upon the appearance of defendant Lewis Abel, the Court was called into session. In the absence of the jury, Mr. Wolff made apologies to the Court on behalf of defendant Lewis Abel. After hearing Mr. Wolff, Mr. Abrams and Lewis Abel, the Court found said defendant Lewis Abel Guilty of contempt of Court and ordered that said defendant pay a fine to the United States of America in the sum of Fifty (\$50.00) Dollars. Thereupon the jury was summoned into Court and trial was resumed. Joseph N. Nathanson, Frank Dito, Cecil E. Coghlan, Norman Reinburg and John Giometti were sworn and testified on behalf [23] of the United States. Mr. Colvin introduced U. S. Exhibits Nos. 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25 for identification. The hour of adjournment having arrived the Court, after admonishing the jury, ordered that the further trial of this case be continued to May 17, 1945, at 10 a. m.

District Court of the United States, Northern
District of California, Southern Division

At a Sated Term of the Southern Division of
the United States District Court for the Northern
District of California, held at the Court Room
thereof, in the City and County of San Francisco,
on Thursday, the 17th day of May, in the year of
our Lord one thousand nine hundred and forty-five.

Present: The Honorable Louis E. Goodman,
District Judge.

[Title of Cause.]

MINUTES OF TRIAL

The jury impaneled herein and the parties hereto
being present as heretofore, the trial of this case
was this day resumed. Victor Figone, Melvyn
Avila, James Cernusco, John E. Vukota, V. M.
Lewis, Henry L. Taylor, Ruth Taylor, Raymond
C. Humes and Walter G. Vogel were sworn and
testified on behalf of the United States. Frank
Dito and Norman Reinburg were recalled for
further testimony. Mr. Wolff introduced in evi-
dence and filed defendant Abel's Exhibits A and B.
Mr. Friedman introduced defendant Feigenbaum's
Exhibit A for identification. Mr. Colvin intro-
duced U. S. Exhibits Nos. 26 to 46, inclusive, for
identification. The hour of adjournment having
arrived, the Court, after admonishing the jury,
ordered that the further trial of this case be con-
tinued to May 18, 1945, at 10 a. m. [25]

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the Southern Division of
the United States District Court for the Northern
District of California, held at the Court Room
thereof,, in the City and County of San Francisco,
on Friday, the 18th day of May, in the year of
our Lord one thousand nine hundred and forty-five.

Present: The Honorable Louis E. Goodman,
District Judge.

[Title of Cause.]

MINUTES OF TRIAL

The parties hereto and the jury impaneled herein
being present as heretofore, the trial of this case
was this day resumed. Francis Duffy, Angelo
Lombardi, Herman Fingerhut, Walter H. Travis
and Edwin C. Harkins were sworn and testified on
behalf of the United States. Mr. Colvin intro-
duced U. S. Exhibits Nos. 47 to 60, inclusive, for
identification. Thereupon the Court, after admon-
ishing the jury, excused the jury until Tuesday,
May 22, 1945, at 10 o'clock A. M. Mr. Colvin
made a motion to admit in evidence U. S. Exhibits
heretofore marked for identification. After argu-
ment by the various attorneys for the defendants,
and the hour of adjournment having arrived, the
Court ordered that this case be continued to May
21, 1945, at 11 o'clock a. m. for argument on said
motion to admit the exhibits in evidence. [26]

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the Southern Division of
the United States District Court for the Northern
District of California, held at the Court Room
thereof, in the City and County of San Francisco,
on Monday, the 21st day of May, in the year of
our Lord one thousand nine hundred and forty-five.

Present: The Honorable Louis E. Goodman,
District Judge.

[Title of Cause.]

MINUTES OF TRIAL.

At 10 o'clock A. M., this case came on regularly
this day for trial. Mr. Riordan, with the consent
of William E. Licking, Esq., Assistant United
States Attorney, made a motion to withdraw U. S.
Exhibits for Identification No. 52, 53, 58 and 60.
After hearing the attorneys, it is ordered that the
said exhibits be allowed to be withdrawn and placed
in the custody of Mr. Heinrich. The exhibits were
delivered by the Clerk to Mr. Heinrich, in open
Court.

At 11 o'clock A. M., the parties hereto were
present as heretofore. In the absence of the jury,
Mr. Colvin's motion to introduce evidence was
taken up. After hearing the arguments of Mr.
Friedman, Mr. Dunne, Mr. Colvin, Mr. Wolf, Mr.
Riordan and the defendant Samuel S. Weiss, it is
ordered that said motion be granted in part.

The hour of adjournment having arrived, it is ordered that the further trial of this case be continued to May 22, 1945 at 10 o'clock A. M. [27]

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 22nd day of May, in the year of our Lord one thousand nine hundred and forty-five.

Present: The Honorable Louis E. Goodman,
District Judge.

[Title of Cause.]

MOTIONS FOR DIRECTED VERDICT OF
NOT GUILTY DENIED

MINUTES OF TRIAL

The parties hereto and the jury hereofore impaneled being present as heretofore, the trial of this case was this day resumed. The Court ordered that all U. S. Exhibits heretofore introduced for identification be filed in evidence and so marked. Ordered that the motion made by Mr. Friedman and joined in by all defendants to exclude certain evidence be denied. Mr. Friedman, Mr. Dunne, Mr. Riordan, Mr. Wolff and the defendant Samuel S. Weiss made motions for directed verdict of not

guilty. After hearing the arguments of the attorneys and Mr. Weiss, it is ordered that said motions be denied. Thereupon all defendants rested, and the evidence was closed. After the arguments to the jury by Mr. Colvin, Mr. Dunne and Mr. Wolff, and the hour of adjournment having arrived, the Court, after admonishing the Jury, ordered that the further trial of this case be continued to May 23, 1945, at 10 a. m. [28]

In the Southern Division of the United States
District Court for the Northern District of
California

[Title of Cause.]

VERDICT

We, the Jury, find as to the defendants at the bar as follows:

Harry Blumenthal: Guilty.

Lewis Abel: Guilty.

Lawrence B. Goldsmith: Guilty.

Samuel S. Weiss: Guilty.

Albert Feigenbaum: Guilty.

ETHEL L. FAIRBAIRN

Foreman.

[Endorsed]: Filed May 23, 1945. [29]

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the Southern Division of
the United States District Court for the Northern
District of California, held at the Court Room
thereof, in the City and County of San Francisco,
on Wednesday, the 23rd day of May, in the year
of our Lord one thousand nine hundred and forty-
five.

Present: The Honorable Louis E. Goodman,
District Judge.

[Title of Cause]

MINUTES OF TRIAL AND VERDICT OF JURY OF GUILTY

The parties hereto and the jury impaneled herein
being present as heretofore, the further trial of
this case was this day resumed. After hearing the
arguments by Mr. Weiss, Mr. Riordan, Mr. Fried-
man and Mr. Colvin, and the instructions of the
Court to the jury, the jury at 4:05 P. M. retired
to deliberate upon its verdict. At 6:00 P. M. the
jury returned into Court and upon being asked if
they had agreed upon a verdict, replied in the
affirmative and returned the following verdict which
was ordered recorded, viz:

“We, the Jury, find as to the defendants at the
bar as follows: Harry Blumenthal, Guilty; Lewis
Abel, Guilty; Lawrence B. Goldsmith, Guilty;
Samuel S. Weiss, Guilty; Albert Feigenbaum,
Guilty. Ethel L. Fairbairn, Foreman.”

The jury upon being asked if said verdict as recorded is the verdict of the jury, each juror replied that it is. Ordered that the jury be excused from the further consideration [30] hereof, and that the jurors be excused until notified to report. Ordered that this case be continued to May 24, 1945, at 10 a. m. for pronouncing of judgment. Ordered that the defendants be remanded to the custody of the United States Marshal to await judgment and that mittimus issue.

[Title of Court and Cause.]

MOTION FOR A NEW TRIAL

Now comes the defendant Louis Abel in the above entitled action and moves this Honorable Court for an order vacating the verdict of the jury convicting said defendant, and granting defendant a new trial for the following, and each of the following, causes materially affecting his Constitutional rights, to wit:

1. That the verdict is contrary to the evidence adduced at the trial herein.
2. That the verdict is not supported by the evidence in the case.
3. That the evidence adduced at the trial is insufficient to justify said verdict.
4. That said verdict is contrary to law.
5. That the trial court erred in admitting evidence in the course of the trial where no proper foundation had been laid.

6. That the trial court erred in admitting evidence in the course of the trial which was hearsay.

7. That the trial court erred in denying defendant's motion made at the close of plaintiff's case, for a directed verdict of acquittal, for the reason that the legal evidence as a matter of law was insufficient to support a verdict of guilty.

8. That the trial court erred in denying defendant's motion made at the close of the entire case for a directed verdict of acquittal for the reason that the legal evidence as a matter of law was insufficient to support a verdict of guilty.

9. That the trial court erred in giving certain instructions of law to the jury and in refusing to give certain instructions of law requested by defendant to the jury. [32]

To all of which rulings defendant duly and regularly excepted.

This written motion, by leave of Court, supplements the oral motion heretofore made by said defendant, and is made upon the minutes of the Court, upon all records and proceedings in said action, and upon all the testimony and evidence introduced at the trial herein.

Dated: May 24, 1945.

HARRY K. WOLFF

SOL A. ABRAMS

Attorneys for said defendant

[Endorsed]: Filed May 24, 1945. [33]

[Title of Court and Cause.]

**MOTION OF LOUIS ABEL IN ARREST OF
JUDGMENT**

Comes now the defendant Louis Abel, in the above entitled action, and against whom a verdict of guilty was rendered on the 23rd day of May, 1945, in the above entitled cause, and moves the Court to arrest the judgment against said defendant and hold for naught the verdict of guilty rendered against said defendant for the following causes:

1. That the verdict is contrary to the evidence adduced at the trial herein.

2. That the verdict is not supported by the evidence in the case.

3. That the evidence adduced at the trial is insufficient to justify said verdict.

4. That said verdict is contrary to law.

5. That the trial court erred in admitting evidence in the course of the trial where no proper foundation had been laid.

6. That the trial court erred in admitting evidence in the course of the trial which was hearsay.

7. That the trial court erred in denying defendant's motion made at the close of plaintiff's case, for a directed verdict of acquittal, for the reason that the legal evidence as a matter of law was insufficient to support a verdict of guilty.

8. That the trial court erred in denying defend-

ant's motion made at the close of the entire case for a directed verdict of acquittal for the reason that the legal evidence as a matter of law was insufficient to support a verdict of guilty.

9. That the trial court erred in giving certain instructions of law to the jury and in refusing to give certain instructions of law requested by defendant to the jury. [34]

Wherefore, because of which said errors in the record hereof, no lawful judgment may be rendered by the Court, said defendant prays that this motion be sustained and that judgment of conviction against him be arrested and held for naught and that he have all such other orders as may seem meet and just in the premises.

This written motion is by leave of Court and supplements the oral motion heretofore made by said defendant, and is made upon the minutes of the Court, upon all records and proceedings in said action, and upon all the testimony and evidence introduced at the trial herein.

Dated: May 24, 1945.

HARRY K. WOLFF

SOL A. ABRAMS

Attorneys for said defendant

[Endorsed]: Filed May 24, 1945. [35]

[Title of Court and Cause.]

MOTION OF DEFENDANT HARRY BLUMENTHAL FOR A DIRECTED VERDICT

To the Honorable Louis E. Goodinan, U. S. District Judge:

Now comes Harry Blumenthal, one of the defendants in the above entitled action and objects to the taking of any further proceedings against said defendant under or by virtue of the said indictment and moves this Honorable Court to direct a verdict in favor of defendant, Harry Blumenthal, and to dismiss the said indictment for the following reasons, to-wit:

I.

That the said indictment does not state facts sufficient to constitute any crime or offense against the United States of America.

II.

That the Maximum Price Regulations 193 and 445 which the said indictment charges that this defendant conspired to commit are, and each of said regulations is, so indefinite and uncertain that it is impossible to determine what is meant thereby, or what acts are prohibited thereby, and in part that it is impossible to ascertain for what price it was lawful at the times mentioned and referred to in said indictment to sell the whiskey referred to in said indictment; and that by reason thereof each of the said regulations is void.

III.

That a conviction under the said indictment would be a violation of the provision of the Fifth Amendment of the Constitution of the United States that no person shall be deprived of life, liberty or property without due process of law; and that this Honorable Court accordingly has no jurisdiction to hear and determine [36] the above entitled cause, or to put this defendant to trial upon the said indictment.

IV.

That no conspiracy has been established.

V.

That the conspiracy charged herein does not constitute an offense under the Emergency Price Control Act or Sections 402A, 904A and 925B thereof, or the Price Administration Regulations or the Maximum Price Regulation 193 or Maximum Price Regulation 445, and that Title 18 of U. S. C., Section 88, is not applicable and does not embrace the conspiracy charged in the indictment herein.

Dated: May 1945.

MORRIS OPPENHEIM

THOS. J. RIORDAN

Attorneys for Defendant

Harry Blumenthal

[Endorsed]: Filed May 24, 1945. [37]

[Title of Court and Cause.]

MOTION FOR NEW TRIAL

Comes now defendant Harry Blumenthal and moves the court to set aside and vacate the verdict heretofore rendered herein on the following grounds:

1. That the verdict is against the law.
2. That the verdict is against the evidence.
3. That the verdict is not supported by the evidence.
4. That the court misdirected the jury in matters of law.
5. That the indictment and each of the counts therein contained do not state facts sufficient to constitute a public offense as against defendant, Harry Blumenthal.
6. That the court erred in denying the motion of defendant, Harry Blumenthal, for a directed verdict at the conclusion of the government's case.
7. That the court erred in denying defendant, Harry Blumenthal's motion for a directed verdict at the conclusion of the whole case.

MORRIS OPPENHEIM,

THOS. J. RIORDAN,

Attorneys for Defendant

Harry Blumenthal.

[Endorsed]: Filed May 24, 1945. [38]

[Title of Court and Cause.]

MOTION FOR NEW TRIAL

Comes now Albert Feigenbaum, defendant above-named, and moves the Court to set aside the verdict herein and grant him a new trial, upon the following grounds, to-wit:

1. The complaint does not state an offense against the laws of the United States.
2. The verdict is contrary to law.
3. The verdict is not supported by the evidence.
4. The Court upon the trial admitted incompetent evidence offered by the United States.
5. The Court improperly instructed the jury.
6. The Court refused to give correct instructions on the law as requested by defendant.
7. The Court erred in refusing to direct a verdict of "Not Guilty" at the close of all the evidence in the case.

Dated: May 24, 1945.

(Signed) LEO R. FRIEDMAN,

Attorney for said Defendant.

[Endorsed]: Filed May 24, 1945. [39]

[Title of Court and Cause.]

MOTION IN ARREST OF JUDGMENT

Comes now Albert Feigenbaum, one of the defendants above named; and moves the Court here to arrest judgment herein and not pronounce the same for the following reasons:

1. That said indictment does not state facts sufficient to constitute an offense under or against the laws of the United States.

2. That it appears from the record that judgment if made and entered would be unlawful.

3. That from the record it appears that the above entitled Court did not have jurisdiction over the offense sought to be alleged in the indictment.

4. That the indictment is not sufficient in form or substance to enable this defendant to plead the judgment in bar of another prosecution for the same offense.

Dated: May 24, 1945.

(Signed)

LEO R. FRIEDMAN,

Attorney for Said Defendant.

[Endorsed]: Filed May 24, 1945. [40]

[Title of Court and Cause.]

**MOTION OF DEFENDANT GOLDSMITH FOR
A NEW TRIAL**

Now Comes the defendant, Lawrence B. Goldsmith, in the above-entitled action and moves this Honorable Court for an order vacating the verdict of the jury convicting him and granting him a new trial on the indictment herein, for the following and each of the following causes, materially affecting the constitutional rights of said defendant:

1. That the verdict is contrary to the evidence adduced at the trial herein;

2. That the verdict is not supported by the evidence in the cause;

3. That the evidence adduced at the trial is insufficient to justify said verdict;

4. That the verdict is contrary to law;

5. That the trial court erred in admitting evidence in the course of the trial, which was incompetent, irrelevant and immaterial, which errors were duly and regularly excepted to by the defendant;

6. That the trial court erred in refusing to direct a verdict of not guilty at the close of the evidence of the United States;

7. That the trial court erred in refusing to strike out certain testimony which was incompetent, irrelevant, immaterial and hearsay;

8. That the trial court erred in refusing to di-

rect a verdict of not guilty at the close of all of the evidence;

9. That the trial court erred in admitting evidence in the course of the trial where no proper foundation had been laid. [41]

This motion is made upon the minutes of the court and upon all records and proceedings in said action and upon all of the testimony and evidence introduced at the trial.

Dated: May 24th, 1945.

WALTER H. DUANE,

ARTHUR B. DUNNE,

Attorneys for Defendant

Goldsmith.

[Endorsed]: Filed May 24, 1945. [42]

[Title of Court and Cause.]

**MOTION OF DEFENDANT GOLDSMITH IN
ARREST OF JUDGMENT**

Now Comes Lawrence B. Goldsmith, one of the defendants in the above-entitled action, against whom a verdict of guilty was rendered on the 23rd day of May, 1945, in the above-entitled cause, and moves the Court to arrest the judgment against him and hold for naught the verdict rendered against him.

1. That the indictment does not state facts sufficient to constitute a public offense under the laws of the United States.

2. That the evidence is not sufficient to support the verdict.

3. That the verdict of the jury is contrary to law.

Wherefore, because of which said errors in the record herein, no lawful judgment may be rendered by the Court and the said defendant prays that this motion be sustained and the judgment of conviction against him be arrested and held for naught, and that said defendant have all such other orders as may seem meet and just in the premises.

Dated: May 24th, 1945.

WALTER H. DUANE,

ARTHUR B. DUNNE,

Attorneys for Defendant

Goldsmith.

[Endorsed]: Filed May 24, 1945. [43]

District Court of the United States, Northern District of California, Southern Division.

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Thursday, the 24th day of May, in the year of our Lord one thousand nine hundred and forty-five:

Present: The Honorable Louis E. Goodman,
District Judge.

[Title of Court.]

ORDER DENYING MOTIONS FOR NEW TRIAL AND IN ARREST OF JUDGMENT, SENTENCE, AND FIXING APPEAL BOND IN SUM OF \$2500.00.

This case came on regularly this day for the pronouncing of judgment. The defendants Harry Blumenthal, Lewis Abel, Lawrence B. Goldsmith, Samuel S. Weiss and Albert Feigenbaum were present in the custody of the United States Marshal. Morris Oppenheim and Thomas J. Riordan, Esqrs., were present on behalf of defendant Harry Blumenthal. Harry K. Wolff and Sol A. Abrams, Esqrs., were present on behalf of defendant Lewis Abel. Arthur B. Dunne and Walter Duane, Esqrs., were present on behalf of defendant Lawrence B. Goldsmith. Leo Friedman, Esq., was present on behalf of defendant Albert Feigenbaum. Motions for new trial and in arrest of judgment were made

by each defendant. After hearing the arguments, it is ordered that each motion be [44] denied.

The defendants were called for judgment. After hearing the defendants and the attorneys, and said defendants having been now asked whether they have anything to say why judgment should not be pronounced against them, and no sufficient cause to the contrary being shown or appearing to the Court, It Is By the Court

Ordered and Adjudged that the defendants Harry Blumenthal, Lewis Abel and Albert Feigenbaum, having been convicted on the verdict of the jury of guilty of the offense charged in the Indictment in the above-entitled case, each be committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of Eight (8) Months and each pay a fine to the United States of America in the sum of One Thousand (\$1,000.00) Dollars.

Ordered and Adjudged that the defendants Samuel S. Weiss and Lawrence B. Goldsmith, having been convicted on the verdict of the jury of guilty of the offense charged in the Indictment in the above-entitled case, each be committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of Two (2) Months and pay a fine to the United States of America in the sum of One Thousand (\$1,000.00) Dollars.

Ordered that judgment be entered herein accordingly as to each defendant.

It Is Further Ordered that the Clerk of this Court deliver a certified copy of each judgment and commitment to [45] the United States Marshal or other qualified officer and that the same shall serve as the commitments herein.

The Court recommends commitment to a County Jail.

Further ordered that defendants be released on \$2500.00 bond pending appeal. [46]

Judgment and Commitment

District Court of the United States, Northern District of California, Southern Division.

No. 29238-G

UNITED STATES,

vs.

HARRY BLUMENTHAL.

JUDGMENT AND COMMITMENT

Criminal Indictment in one count for violation of Title 18, U. S. C., Section 88.

On this 24th day of May, 1945, came the United States Attorney, and the defendant, Harry Blumenthal, appearing in proper person, and by counsel, and;

The defendant having been convicted on verdict of guilty of the offense charged in the Indictment in the above-entitled cause, to wit: Viol. Title 18, USC, Section 88. Defendant did, at a time and place unknown, unlawfully conspire with divers persons to sell whiskey at a price in excess of and higher.

than the maximum price established by law, and did commit various overt acts to effect the object of said conspiracy, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offense, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of Eight (8) Months, and pay a fine to the United States of America in the sum of One Thousand (\$1,000.00) Dollars.

Entered in Vol. 36 Judg and Decrees at Page 105.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

Examined by:

REYNOLD H. COLVIN,

Assistant U. S. Attorney.

(Signed)

LOUIS E. GOODMAN,

United States District Judge.

The Court recommends commitment to the County Jail.

Filed and Entered this 24th day of May, 1945.

(Signed)

C. W. CALBREATH,

Clerk.

By R. E. WOODWARD,

Deputy Clerk. [47]

District Court of the United States, Northern District of California, Southern Division.

No. 29238-G.

UNITED STATES

vs.

LEWIS ABEL

JUDGMENT AND COMMITMENT

Criminal Indictment in one count for violation of Title 18, U. S. C., Section 88.

On this 24th day of May, 1945, came the United States Attorney, and the defendant, Lewis Abel, appearing in proper person, and by counsel, and,

The defendant having been convicted on verdict of guilty of the offense charged in the Indictment in the above-entitled cause, to wit: Viol. Title 18, USC, Section 88. Defendant did, at a time and place unknown, unlawfully conspire with divers persons to sell whiskey at a price in excess of and higher than the maximum price established by law, and did commit various overt acts to effect the object of said conspiracy, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offense, is hereby committed to the custody of the Attorney General or his

authorized representative for imprisonment for the period of Eight (8) Months, and pay a fine to the United States of America in the sum of One Thousand (\$1,000.00) Dollars.

Entered in Vol. 36, Judg. and Decrees, at Page 104.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

Examined by:

REYNOLD H. COLVIN,

Assistant U. S. Attorney.

(Signed)

LOUIS E. GOODMAN,

United States District Judge.

The Court recommends commitment to a County Jail.

Filed and Entered this 24th day of May, 1945.

(Signed)

C. W. CALBREATH,

Clerk.

By R. E. WOODWARD,

Deputy Clerk. [48]

District Court of the United States, Northern District of California, Southern Division.

No. 29238-G

UNITED STATES,

vs.

SAMUEL S. WEISS.

JUDGMENT AND COMMITMENT-

Criminal Indictment in one count for violation of Title 18, U. S. C., Section 88.

On this 24th day of May, 1945, came the United States Attorney, and the defendant, Samuel S. Weiss, appearing in proper person, and by counsel, and,

The defendant having been convicted on verdict of guilty of the offense charged in the Indictment in the above-entitled cause, to wit: Viol. Title 18, USC, Section 88. Defendant did, at a time and place unknown; unlawfully conspire with divers persons to sell whiskey at a price in excess of and higher than the maximum price established by law, and did commit various overt acts to effect the object of said conspiracy, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offense, is hereby com-

mitted to the custody of the Attorney General or his authorized representative for imprisonment for the period of Two (2) Months, and pay a fine to the United States of America in the sum of One Thousand (\$1,000.00) Dollars.

Entered in Vol. 36, Judg. and Decrees, at Page 101.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

Examined by:

REYNOLD H. COLVIN,

Assistant U. S. Attorney.

(Signed)

LOUIS E. GOODMAN,

United States District Judge.

The Court recommends commitment to a County Jail.

Filed and Entered this 24th day of May, 1945.

(Signed)

C. W. CALBREATH,

Clerk.

By R. E. WOODWARD,

Deputy Clerk. [49]

District Court of the United States, Northern District of California, Southern Division

No. 29238-G

UNITED STATES,

vs.

ALBERT FEIGENBAUM.

JUDGMENT AND COMMITMENT

Criminal Indictment in one count for violation of Title 18, U. S. C., Section 88.

On this 24th day of May, 1945, came the United States Attorney, and the defendant, Albert Feigenbaum, appearing in proper person, and by counsel, and,

The defendant having been convicted on verdict of guilty of the offense charged in the Indictment in the above-entitled cause, to wit: Viol. Title 18, USC, Section 88. Defendant did, at a time and place unknown, unlawfully conspire with divers persons to sell whiskey at a price in excess of and higher than the maximum price established by law, and did commit various overt acts to effect the object of said conspiracy, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having

been found guilty of said offense, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of Eight (8) Months, and pay a fine to the United States of America in the sum of One Thousand (\$1,000.00) Dollars.

Entered in Vol. 36, Judg. and Decrees, at Page 103.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer, and that the same shall serve as the commitment herein.

Examined by:

REYNOLD H. COLVIN,

Assistant U. S. Attorney.

(Signed)

LOUIS E. GOODMAN,

United States District Judge.

The Court recommends commitment to a County Jail.

Filed and Entered this 24th day of May, 1945.

(Signed)

C. W. CALBREATH,

Clerk.

By R. E. WOODWARD,

Deputy Clerk. [50]

District Court of the United States, Northern District of California, Southern Division.

No. 29238-G

UNITED STATES

vs.

LAWRENCE B. GOLDSMITH.

JUDGMENT AND COMMITMENT

Criminal Indictment in one count for violation of Title 18, U. S. C., Section 88.

On this 24th day of May, 1945, came the United States Attorney, and the defendant, Lawrence B. Goldsmith, appearing in proper person, and by counsel, and

The defendant having been convicted on verdict of guilty of the offense charged in the Indictment in the above-entitled cause, to wit: Viol. Title 18, USC, Section 88. Defendant did, at a time and place unknown, unlawfully conspire with divers persons to sell whiskey at a price in excess of and higher than the maximum price established by law and did commit various overt acts to effect the object of said conspiracy, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offense, is hereby com-

mitted to the custody of the Attorney General or his authorized representative for imprisonment for the period of Two (2) Months, and pay a fine to the United States of America in the sum of One Thousand (\$1,000.00) Dollars.

Entered in Vol. 36, Judg. and Decrees, at Page 102.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

Examined by:

REYNOLD H. COLVIN,

Assistant U. S. Attorney.

(Signed) LOUIS E. GOODMAN,

United States District Judge.

The Court recommends commitment to a County Jail.

Filed and Entered this 24th day of May, 1945.

(Signed) C. W. CALBREATH,

Clerk.

By R. E. WOODWARD,

Deputy Clerk. [51]

[Title of Court and Cause.]

NOTICE OF APPEAL

Name and address of Appellant: Louis Abel,
County Jail, City and County of San Francisco,
State of California.

Name and address of Appellant's attorneys:
Harry K. Wolff, Central Tower, and Sol. A.
Abrams, 406 Montgomery Street, San Francisco,
California.

Offense: A violation of 18 USC 88 (conspiracy).

That the defendant did, in the November, 1944,
term of court, knowingly, unlawfully, wilfully, cor-
ruptly and feloniously, conspire, combine, confed-
erate, arrange and agree, together with Harry Blu-
menthal, Lawrence B. Goldsmith, Samuel S. Weiss
and Albert Feigenbaum, and divers other persons
whose names are unknown to the Grand Jurors, to
commit offenses against the United States of Amer-
ica and laws thereof, the offenses being to know-
ingly, wilfully and unlawfully sell at wholesale cer-
tain distilled spirits, to wit, Old Mr. Boston Rock-
ing Chair Whiskey, in excess of and higher than the
maximum price established by law, said maximum
price at wholesale then and there being not in ex-
cess of \$25.27 per case of twelve bottles, each of
said twelve bottles containing one-fifth of one gal-
lon of said Old Mr. Boston Rocking Chair Whis-
key, in violation of Sections 902(a), 904(a), and
925(b) of Title 50, U.S.C.A. App., and Office of

Price Administration Regulations: Maximum Price Regulation 193 and Maximum Price Regulation 445.

Date of Judgment: May 24th, 1945.

Description of Judgment and Sentence:

Judgment: Defendant "guilty" as charged in said indictment above set forth. [52]

Sentence: Imprisonment for eight (8) months and pay a fine of One Thousand Dollars (\$1,000.00).

Name of Prison where now confined: County Jail of the City and County of San Francisco.

I, the above-named appellant, hereby appeal to the United States Circuit Court of Appeal of the Ninth Circuit, from the judgment above-mentioned, on the grounds set forth below.

LOUIS ABEL,

Appellant.

HARRY K. WOLFF,

SOL A. ABRAMS,

Attorneys for Appellant.

GROUND OF APPEAL

I.

That the learned trial judge committed errors in law arising during the course of the trial and erred in the decision of questions of law arising during the course of the trial.

II.

That the evidence produced and received upon

the trial of said cause was insufficient as a matter of law to justify the verdict of the jury.

III.

That the learned trial judge erred in allowing hearsay evidence upon the trial of said cause.

IV.

That the learned trial judge erred in admitting evidence in the course of the trial where no proper foundation had been laid. [53]

V.

That the learned trial judge erred in denying appellant's motion, made at the close of appellee's case, for a directed verdict of acquittal for the reason that the legal evidence as a matter of law was insufficient to support a verdict of guilty.

VI.

That the learned trial judge erred in denying appellant's motion, made at the close of the entire case, for a directed verdict of acquittal for the reason that the legal evidence as a matter of law was insufficient to support a verdict of guilty.

VII.

That the learned trial judge erred in denying appellant's motion for a new trial made after the verdict and before the pronouncement of sentence, upon the grounds orally stated at the time, and supplemented by written motion filed immediately thereafter.

VIII.

That the learned trial judge erred in denying appellant's motion for arrest of judgment made after the verdict and before the pronouncement of sentence, upon the grounds orally stated at the time and supplemented by written motion filed immediately thereafter.

IX.

That the learned trial judge erred in giving certain instructions of law to the jury and in refusing to give certain instructions of law requested by defendant to the jury.

[Endorsed]: Filed May 24, 1945. [54]

[Title of Court and Cause.]

NOTICE OF APPEAL OF HARRY
BLUMENTHAL

Name and address of appellant: Harry Blumenthal, 100 Junipero Serra Boulevard, San Francisco, Calif.

Names and addresses of appellant's attorneys: Morris Oppenheim, Phelan Building, San Francisco, Calif.; Thos. J. Riordan, Russ Building, San Francisco, Calif.

Offense: Violation: Title 18, U. S. Code 88 (Crim. Code 37). Conspiracy to violate Title 50 U.S.C. appendix Emergency Price Control Act, Section

902A, 904A and 925B thereof and regulations thereunder No. 193 and 445 and amendments thereto.

Date of Judgment: May 24th, 1945.

Brief description of judgment or sentence: 8 months in County Jail in San Francisco; \$1000.00 Fine.

Name of prison where now confined if not on bail. On bail.

I, the above named appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above mentioned on the grounds set forth below.

Pursuant to Rule V, I hereby serve notice that I do not elect to enter upon the service of sentence pending appeal.

Dated: May 24th, 1945.

HARRY BLUMENTHAL
Appellant

THOS. J. RIORDAN
MORRIS OPPENHEIM

Attorneys for Appellant

GROUND OF APPEAL

I.

That the verdict was not supported by the evidence. [55]

II.

That the verdict was contrary to law.

III.

That the verdict was contrary to the evidence.

IV.

That the verdict was contrary to the law and the evidence.

V.

Insufficiency of the evidence to sustain the verdict.

VI.

Plain errors of law occurring at the trial and not excepted to.

VII.

Plain errors of law occurring at the trial and not excepted to by which the defendant, Harry Blumenthal, was denied a fair and impartial trial.

VIII.

The judgment is contrary to the law.

IX.

The indictment fails to state a public offense against the laws of the United States.

X.

There is no reasonable or probable cause upon which the indictment was based.

XI.

The Court erred in overruling appellant's demurrers and motion to quash. [56]

XII.

Title 18, U. S. Code 88 (Criminal Code 37) con-

spiracy to violate title 50 U.S.C. Appendix, Sections 902A, 904A and 925B thereof and regulations thereunder Nos. 193 and 445 and amendments thereto, inherently and as construed and applied in this case is unconstitutional.

HARRY BLUMENTHAL

Appellant

THOS. J. RIORDAN

MORRIS OPPENHEIM

Attorneys for Appellant

[Endorsed]: Filed May 24, 1945. [57]

[Title of Court and Cause.]

NOTICE OF APPEAL

Name and Address of Appellant: Albert Feigenbaum, 2481 Mission Street, San Francisco, Calif.

Name and Address of Appellant's Attorney: Leo R. Friedman, 935 Russ Building, San Francisco, California.

Offense: Violating 18 U.S.C.A. sec. 88. (Conspiracy to sell whiskey in excess of maximum price.)

Date of Judgment: May 24, 1945.

Description of Judgment and Sentence: Imprisonment for term of 8 mos. County Jail. Fine of \$1000.00.

Name of Prison Where Confined: On Bail.

I, the above named appellant, hereby appeal to

the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above mentioned on the grounds set forth below.

Dated: May 24, 1945.

ALBERT FEIGENBAUM

Appellant [58]

GROUND OF APPEAL

1. The indictment does not state an offense against the laws of the United States.

2. The Court did not have jurisdiction of the charge and offense set forth in the indictment.

3. The verdict is contrary to law.

4. The evidence was insufficient to support either the verdict or judgment.

5. The Court erred in denying appellant's motion for a directed verdict of not guilty made at the close of all the testimony and evidence in the case.

6. The Court erred in admitting incompetent evidence offered by the United States.

7. The Court improperly instructed the jury, to the substantial prejudice of appellant.

8. The Court refused, to the substantial prejudice of appellant, to give correct instructions on the law requested by appellant.

9. The Court erred in permitting the jury to consider acts and declarations of alleged co-conspirators, made out of the presence of appellant, in determining whether the conspiracy charged existed and whether the appellant was a member thereof.

[Endorsed]: Filed May 24, 1945. [59]

[Title of Court and Cause.]

NOTICE OF APPEAL OF DEFENDANT
GOLDSMITH

Name and Address of Appellant: Lawrence B. Goldsmith, 2100 Pacific Avenue, San Francisco, California.

Names and Addresses of Appellant's Attorneys: Walter H. Duane, 790 Mills Building, 220 Montgomery Street, San Francisco 4, California, and Arthur B. Dunne, 333 Montgomery Street, San Francisco 4, California.

Offense: Conspiracy to violate the Emergency Price Control Act, Title 50 U.S.C.A. App. Sections 902 (a) 904 (a) and 925 (b), as follows:

That the defendant, with others, within the said Division and District, did knowingly, wilfully, unlawfully and corruptly conspire, combine, confederate, arrange and agree with others to commit offenses against the United States, to-wit: to knowingly, wilfully and unlawfully sell at wholesale certain distilled spirits, to-wit: Old Mister Boston Rocking Chair Whiskey, in excess of and higher than the maximum price established by law, and in pursuance of said conspiracy and to accomplish the purpose thereof the said defendant and Samuel S. Weiss, a co-defendant, on or about the 10th day of January, 1944, at the City and County of San Francisco, State of California, completed and delivered to one John Giometti invoice No. 10171 of the Francisco Distributing Company, and that on or about the 5th day of January, 1944, at the City and County of San Francisco, State of California, said

defendant and said Samuel S. Weiss, a co-defendant, shipped 25 cases of Old Mister Boston Rocking Chair Whiskey to Herman Fingerhut at Vallejo, California.

Date of Judgment: May 24, 1945.

Description of Judgment and Sentence: "Guilty" as charged in said indictment, as above set forth; Two (2) months in the County Jail of the City and County of San Francisco and a [60] fine of One Thousand Dollars (\$1,000.00).

Name and Prison Where Now Confined: County Jail of the City and County of San Francisco.

I, the above named appellant, hereby appeal to the United States Circuit Court of Appeal of the Ninth Circuit, from the judgment above mentioned, on the grounds set forth below:

GROUND'S OF APPEAL

I.

That the learned Trial Judge committed errors in law arising during the course of the trial, and erred in the decision of questions of law arising during the course of the trial.

II.

That the evidence produced and received upon the trial of said cause was insufficient as a matter of law to justify the verdict of the jury.

III.

That the learned Trial Judge erred in denying

the motion made by counsel for defendant for a directed verdict of "Not Guilty" at the conclusion of the case of the prosecution, for the reason that taking said evidence in said case is not sufficient as a matter of law to support a verdict of "Guilty."

IV.

That the Trial Court erred in not instructing the jury to return a verdict of "Not Guilty" in favor of appellant.

Dated: May 24, 1945.

LAWRENCE B. GOLDSMITH

Appellant

WALTER H. DUANE

ARTHUR B. DUNNE

Attorneys for Appellant

[Endorsed]: Filed May 24, 1945. [61]

[Title of Court and Cause.]

NOTICE OF APPEAL OF SAMUEL S. WEISS

Name and address of appellant: Samuel S. Weiss,
Fielding Hotel, San Francisco, Calif.

Name and address of appellant's attorney: (in
propria persona).

Offense: Violation: Title 18, U. S. Code 88 (Crim.
Code 37) Conspiracy to violate Title 50 U.S.C.
appendix, Emergency Price Control Act, Sections
902A, 904A and 925B thereof and regulations there-
under No. 193 and 445 and amendments thereto.

Date of judgment: May 24, 1945.

Brief description of judgment or sentences: Sentence 2 months, fined \$1000.00.

Name of prison where now confined if not on bail:

I, the above named appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above mentioned on the grounds set forth below.

Pursuant to Rule V, I hereby serve notice that I do not elect to enter upon the service of sentence pending appeal.

Dated: May 25, 1945.

SAMUEL S. WEISS

Appellant

In propria persona.

Attorney for Appellant

GROUND'S OF APPEAL

I.

That the verdict was not supported by the evidence.

II.

That the verdict was contrary to law.

III.

That the verdict was contrary to the evidence.

IV.

That the verdict was contrary to the law and the evidence.

V.

Insufficiency of the evidence to sustain the verdict.

VI.

Plain errors of law occurring at the trial and not excepted to.

VII.

Plain errors of law occurring at the trial and not excepted to by which the defendant, Samuel Weiss, was denied a fair and impartial trial.

VIII.

The judgment is contrary to the law.

IX.

The indictment fails to state a public offense against the laws of the United States.

X.

There is no reasonable or probable cause upon which the indictment was based.

XI.

The court erred in overruling appellant's demurrers and motion to quash.

XII.

Title 18, U. S. Code 88 (Criminal Code 37) conspiracy to violate title 50 U.S.C. Appendix, Sections 902A, 904A, and 925B thereof and regulations thereunder Nos. 193 and 445 and amendments thereto,

inherently and as construed and applied in this case is unconstitutional.

SAMUEL S. WEISS

Appellant

In propria persona

Attorney for Appellant

[Endorsed]: Filed May 25, 1945. [63]

[Title of Court and Cause.]

**ASSIGNMENT OF ERRORS OF DEFENDANT
HARRY BLUMENTHAL**

Now Comes Harry Blumenthal, one of the defendants and appellants in the cause numbered and entitled as above, who has heretofore appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment and sentence given, made and entered against him in said cause in and by the said District Court, and, having duly given his notice of appeal in the manner and form provided by law, and by the Rules adopted and promulgated by the Supreme Court of the United States governing appeals in criminal cases, files this, his assignment of the errors upon which he will rely for a reversal of the judgment and sentence, aforesaid, and says, that in the record and proceedings aforesaid, as also in the judgment of the plea herein, manifest error hath happened to the grievous damage of him, the said Harry Blumenthal, in each and every of the following particulars, to-wit:

I.

That the said District Court erred in its order overruling the demurrer of said defendant Harry Blumenthal to the indictment in the above-entitled cause, to which order and ruling of said District Court this defendant duly Excepted.

II.

That said District Court erred in its order denying the motion of this defendant Harry Blumenthal to quash and set aside the said indictment and hold the same for naught, to which order and ruling of the said District Court the said defendant Harry Blumenthal duly Excepted. [65]

III.

That said District Court erred in granting the motion of counsel for the United States of America, made at the conclusion of the taking of testimony upon the trial of said cause, to admit all evidence which had been admitted against any defendant as against all defendants and to admit all documents theretofore marked for identification in evidence against all the defendants, to which ruling of the said District Court counsel for this defendant Harry Blumenthal duly Excepted.

IV.

That the said District Court erred in denying the motion of counsel for this defendant at the conclusion of the case for the Government that the court instruct the jury to find this defendant not guilty, to which ruling and order of the said District Court

counsel for this defendant Harry Blumenthal duly Excepted.

V.

That said District Court erred in denying the motion made by counsel for said defendant Harry Blumenthal after all the testimony and evidence had been introduced and both sides had rested the case for an instructed verdict of not guilty as to said defendant Harry Blumenthal, to which ruling and order of the said District Court counsel for this defendant Harry Blumenthal duly Excepted.

VI.

That the said District Court erred in denying the motion of said defendant Harry Blumenthal for a new trial, to which ruling and order of the said District Court counsel for this defendant Harry Blumenthal duly Excepted. [66]

VII.

That said District Court erred in denying the motion of said defendant Harry Blumenthal in arrest of judgment, to which order and ruling of said District Court counsel for said defendant Harry Blumenthal duly Excepted.

VIII.

That the said District Court, upon the trial of said cause, erred in admitting in evidence over the objection of counsel for said defendant, "U. S. Exhibit 2," the said exhibit being a document entitled "Wholesale Liquor Dealers Monthly Report Summary of Forms 52-A and 52-B," showing the

purchases of the Francisco Distributing Company during the month of December, 1943, as kept in the records of the United States Internal Revenue Department, to which ruling of the court counsel for said defendant Harry Blumenthal then and there duly Excepted.

IX.

That the said District Court, upon the trial of said cause, erred in admitting in evidence over the objection of counsel for said defendant, "U. S. Exhibit 3," the said exhibit being a document entitled "Wholesale Liquor Dealers Monthly Report Summary of Forms 52-A and 52-B," showing the purchases of the Francisco Distributing Company during the month of January, 1944, as kept in the records of the United States Internal Revenue Department, to which ruling of the court counsel for said defendant Harry Blumenthal then and there duly Excepted.

X.

That the said District Court erred in admitting in evidence over the objection of counsel for said defendant Harry Blumenthal "U. S. Exhibits 4, 5 and 6," the same [67] being the so-called 52-A and 52-B records of the Francisco Distributing Company which had been filed with said United States Internal Revenue Department from the month of March, 1942, to the month of December, 1943, to which ruling of the court counsel of said defendant Harry Blumenthal then and there duly Excepted.

XI.

That the said District Court erred in denying the

motion of counsel for said defendant Harry Blumenthal to strike out all the evidence of the witness Robert Otis Grubbs, which said evidence was, and is, as follows, to-wit:

“Direct Examination by Mr. Colvin

I am known as Chief Claims Clerk, Santa Fe Railroad, San Francisco. I have seniority back to 1911, but I have worked for them several times before that. It dates back as far as 1902. I have held this particular position since 1919. I appear under subpoena from the Clerk of the District Court. That subpoena directed me to bring with me certain freight bills. I have them with me. (Thereupon a freight bill produced by the witness was marked ‘U. S. Exhibit 7’ for identification.) (Another bill of lading was marked ‘U. S. Exhibit 8’ for identification.)

The Witness Testified:

Those two freight bills are kept as a permanent office file pursuant to the conduct of the Santa Fe’s business. The documents now shown me are copies of the original records No. 7 and No. 8. (Thereupon, ‘U. S. Exhibits 7 and 8’ for identification [68] were received in evidence.”

to which ruling of the court counsel for said defendant Harry Blumenthal then and there duly Excepted.

XII. :

That said District Court erred in denying the motion of said defendant Harry Blumenthal to

strike out the following testimony of the witness Fred A. Sander:

"1426 cases were delivered from the car on arrival"

upon the ground that the same was incompetent, irrelevant, immaterial and hearsay, to which ruling of the court counsel for said defendant Harry Blumenthal then and there duly Excepted.

XIII.

That the said District Court erred in overruling the objection of counsel for said defendant Harry Blumenthal to the following question asked by counsel for the Government:

"Q. Mr. Sanders, who, if anyone, instructed you regarding the unloading of the two freight cars whose numbers appear in your records?"

and in permitting the witness to answer the said question as follows, to-wit:

"The instructions came through a Mr. Weiss, representing himself as Francisco Distributing Company. Mr. Weiss personally gave me those instructions. I held a conversation with Mr. Weiss covering the unloading of these cars. The conversation took place to the best of my knowledge at our office. The date of the conversation was on or about December 15, 1943. Nobody was present beside Mr. Weiss and myself." [69]

to which ruling of the Court counsel for said de-

fendant Harry Blumenthal then and there duly Excepted.

XIV.

That the said District Court erred in admitting in evidence the following testimony of the said witness Sanders with reference to the conversation referred to in the last assignment, to-wit:

“Q. What was the content of this conversation relating to those shipments?”

Counsel for the defendant Blumenthal objected to the question on the ground that it was incompetent, irrelevant and immaterial, hearsay, no part of the res gestae so far as the defendant Blumenthal was concerned, and not within the issues of the charge of conspiracy as far as the defendant Blumenthal was concerned, and asked the court that if the conversation was related, that the jury be instructed to disregard the statement as to the defendant Harry Blumenthal. The court stated that it would not instruct the jury to disregard the statement, to which ruling of the court counsel for defendant Blumenthal duly Excepted.

“(The Witness Continuing):

Mr. Weiss came in to ask us if we could handle the cars or distribution for him, and after a little consultation about it in our distributing office we finally agreed to accept the car for him and distribute it and asked him to give us his address. He said he would arrange to have them down to us. I subsequently received certain orders from Mr. Weiss. They are all together here in the file. This

is the merchandise which was delivered ex car 1426 cases. [70]

When I refer to 'this car', I mean that car for which receipt was dated December 17, 1943. The number of that car was PRR 568,500."

XIV.

That said District Court erred in admitting in evidence over the objection of the defendant Blumenthal the following evidence, oral and documentary, during the testimony of the witness Sander: "These papers were handed to me by Mr. Weiss at our office, 625 Third Street, San Francisco. We did not have the cars in our possession. We had advised Mr. Weiss to pay the freight, surrender the bills of lading, so we could get the cars into the warehouse. We subsequently got possession of the merchandise in these cars and made delivery of it in accordance with these documents."

Thereupon, the Court admitted the document (U. S. Exhibit 10) in evidence, to which ruling counsel for defendant Blumenthal duly excepted.

XV.

That the said District Court erred in giving the following instruction to the jury during the course of the examination of the witness Joseph N. Nathanson, as more fully appears from the record as follows, to-wit:

"The Court: I will instruct the jury at the present time that pursuant to the authority given to him by statute; the Price Administrator on May 22, 1943, promulgated an Order No. 5 in which he

fixed the maximum prices for all sales [71] by Ben Burke, Inc., Foster & Company, and American Distilling Company as follows: That on or after May 24, 1943 Ben Burke, Inc., Boston, Massachusetts, Foster & Company, New York City, and American Distilling Company, Beacon, Illinois, may sell and deliver to any person, and any person may buy and receive from those sellers Old Mr. Boston Rocking Chair whiskey, a blend of straight Bourbon whiskies, 80.6 proof, aged as above, at the following prices: \$19.24—that is not in issue; that is another kind of whiskey?

Mr. Colvin: That is for pints.

The Court: \$15.37 plus \$3.87, being the amount of the increased Federal excise tax of November 1, 1942 applicable thereto, or a total of \$19.24 per case of 12 bottles, each bottle containing one-fifth gallon of such whiskey.

Now, do you wish to take an exception to that?

Mr. Friedman: Yes, your Honor. I wish to object to what your Honor has told the jury, and I ask your Honor to instruct the jury to disregard anything you have just read from the Federal Register or advised them about, upon the following grounds:

First, that the purported order is only an order that regulates processors of these particular distilled spirits; it has nothing to do with wholesalers; it has nothing to do with [72] people who buy from wholesalers or jobbers—that is the portion you have instructed the jury about—and therefore that this portion of the order is not bind-

ing upon Mr. Feigenbaum in this case, who is neither a processor nor a wholesaler of distilled spirits.

Secondly, upon the ground that the order on its face is in violation and in excess of the power conferred by the Emergency Price Control Act for these reasons: That under the Emergency Price Control Act the Administrator has the power by general order and by general order only to fix the prices of any commodity within a particular area or region, and that he has not the power and never was given the power by Congress to fix different prices for different people for the manufacture of the same kind of article, and this is a special order applicable only to certain people.

The Court: Do you propose to follow this up with further regulations with respect to the prices fixed for sale at wholesale?

Mr. Colvin: Yes, your Honor.

The Court: And this is preliminary to that?

Mr. Colvin: Yes, your Honor.

The Court: I will overrule the objection, and an exception may be noted.

Mr. Duane: If the Court please, in behalf of the defendant Goldsmith I desire to offer the objection that this testimony and this [73] regulation for this purpose is incompetent, irrelevant and immaterial. We are not here charged with any dealings with Burke or the American Distillery or anyone else.

The Court: I understand that.

Mr. Duane: We urge our objection on that ground.

The Court: I have instructed the jury as to that regulation and overrule the objection upon the statement of the District Attorney that it is preliminary to showing a further price regulation for sales by wholesalers. There may be some connection there. I can't see that that would do any harm.

Mr. Friedman: I would ask your Honor to limit this testimony so that it does not go in as against the defendant Feigenbaum, who is not within either of the categories mentioned by Mr. Colvin.

Mr. Riordan: Before the Court rules on that may I for the record, for the defendant Blumenthal, adopt the objections made by Mr. Friedman and Mr. Duane, and object upon the further ground that it is an unlawful delegation of power in any event, also reiterating Mr. Friedman's objection particularly as to Mr. Blumenthal, that this is in no way binding upon the defendant Blumenthal as far as this evidence goes, because of the fact that there is no tie-in regarding any records here, everything that has been introduced at this time concerning it, I realize your Honor has that in mind.

The Court: I will instruct the jury that the instructions as to this order of the Price [74] Administrator are now only being considered by the jury as against the defendant Goldsmith and if it is connected up with the other defendants it may be admitted later as to them.

Mr. Duane: May I, then, in behalf of the defendant Goldsmith, your Honor, make this further objection: that the order referred to an order promulgated by the Office of Price Administration, and the Price Administrator, is invalid and void, and that such order was adopted by the use of a delegation of power which of itself was invalid in this case.

The Court: That objection will be overruled and an exception noted.

Mr. Duane: Exception.

Mr. Riordan: Exception.

XVI.

That the said District Court erred in admitting, over the objection of the defendant Blumenthal, the following testimony of the witness Norman Reinberg:

“Q. Were 100 cases of Old Boston Rocking Chair Whiskey delivered to you?”

Counsel for the defendant Blumenthal objected to the question upon the ground that it was incompetent, irrelevant and immaterial and called for the opinion and conclusion of the witness. The Court overruled the objection, to which counsel for the defendant Blumenthal duly Excepted.

XVII.

That the said District Court overruled in admitting the following testimony of the witness Reinburg over the objection of the defendant Blumenthal: [75]

“During this period of time I traveled to San

Francisco with Mr. Abel on two occasions. The first occasion was about the 6th or 7th of December. I took Mr. Abel with me in my car. I took him in the downtown section here, about three or four blocks off Market, around Third or Fourth. The place was a jewelry store, pawn shop, sports-goods. I left Mr. Abel off at this sports-goods shop. I had a conversation I would pick him up in half an hour. I drove down there on the date of the first trip at Mr. Abel's direction. He did not say to drive to this particular sports shop. He said, 'Up that street, down that, and stop here.'

to which ruling counsel for the defendant Blumenthal duly Excepted.

XVIII.

That the said District Court erred in admitting in evidence over the objection of the defendant Blumenthal the following testimony of the witness John Giometti:

"I have the Owl Cafe, 121 Georgia Street, Vallejo, California, and hold a liquor license at those premises. I was in that business during the month of December, 1943, and the month of January, 1944. During those months, I purchased some Old Mr. Boston Rocking Chair Whiskey from the Francisco Distributing Company. I paid 65c a case for that whiskey. I gave a check to Norman Reinburg and the cash to get me the whiskey."

to which ruling, counsel for the defendant Blumenthal duly Excepted. [76]

XIX.

That the said District Court erred in admitting in evidence over the objection of the defendant Blumenthal the following testimony of the witness James Cermusco:

"Mr. Colvin: At whose direction did you stop at that place on Third Street?"

Mr. Riordan: I object to that as incompetent, irrelevant and immaterial as to defendant Blumenthal. We are not bound by any directions."

The Court overruled the said objection, to which counsel for defendant Blumenthal duly Excepted.

"The witness: (To the Court) The man who was driving the car stopped there. He was the man who said he came from the Francisco Distributing Company."

XX.

That the said District Court erred in admitting the following evidence over the following objections of counsel for the defendant Blumenthal upon the examination of the witness James Cermusco, to which counsel for the defendant Blumenthal duly Excepted:

"The check for \$2,000 dated December 14th marked 'U. S. Exhibit 31' for identification was given to a man who said he was a salesman at the same time the Dakota check for \$2,000 was given to him. Both of these checks were given at the same time. I gave Government's Exhibit for identification No. 29 and Government's Exhibit for identification No. 30, each for \$450 to the man who said he was [77] the salesman at the same time.

I gave that man the \$450 check on Townsend Street, near the Clarke Draying Company. At the time I gave him the check I gave him \$6,100 in cash. We drove up Third Street stopped for a while, and then, from there we came down to Townsend Street. I couldn't very clearly say what I was talking about at that time. I had a conversation the time I stopped on Third Street that day as to where the whiskey was, and they said it was in the San Francisco Warehouse Company.

Q. What did you say to that?

Mr. Riordan: I object to this on the ground it is hearsay as to the defendant Blumenthal. It is completely hearsay as to him. The court overruled the said objection, to which counsel for the defendant Blumenthal duly Excepted.

(The Witness Continuing): Well, he says the San Francisco Warehouse, so we drove up the street, Third Street, and, like I said, we stopped the car on Third Street, between Mission and Market, and from there, we drove around and came back to Townsend Street, which the San Francisco Warehouse is around the corner from, Third Street, and then we went and seen that the whiskey was there, which it was, and from there on he said 'Here is the bills for the whiskey', and he wanted the money. So there we went back into the car, gave him the money and he gave me the bill of ladings, or bills of whiskey—I don't know what they were.

(To the Court): He said it was in the San [78]

Francisco Warehouse; he had to get some bill of ladings, some receipts for the whiskey."

XXI.

That the said District Court erred during the testimony of the witness Angelo Lombardi, in admitting the following evidence, when the said witness was testifying as to a transaction with on, Minkler, out of the presence of the defendant Blumenthal, and in overruling the objection thereto as follows:

"Q. What happened back at Santa Rosa regarding this transaction?"

Counsel for the defendant Blumenthal objected to the question as hearsay and not binding upon the defendant Blumenthal. The Court overruled the objection, to which ruling counsel for the defendant Blumenthal Excepted.

(The Witness Continuing): "We just left there and Minkler went back to his own place of business, and I went back to mine, and about two or three days after he called up and says that the whiskey is on its way."

Counsel for the defendant Blumenthal objected to this evidence and to anything that happened between Minkler and the witness. The Court overruled the objection, to which counsel for the defendant Blumenthal duly Excepted.

(The Witness Continuing): "I received a phone call from Minkler. He said, 'The whiskey will be up in a few days'. About Friday the whiskey arrived, 100 cases, by Sonoma-Marin Freight Company. That is my signature on the check for

\$2,450 shown me. I wrote [79] the check out and delivered it to the name on there, Clyde Minkler. I wrote the check for \$2,400 at the instructions of Clyde Minkler."

XXII.

That the said District Court erred in granting the motion of the United States Attorney to strike out certain testimony given on cross-examination by the witness Travis, to which ruling counsel for the defendant Blumenthal duly Excepted:

Q. But the truth is, you have never been indicted in this conspiracy that you were also in.

A. No.

Mr. Colvin: I ask that that be stricken.

Mr. Riordan: Well, it goes to the weight and credibility, and to the interest, bias and prejudice as to why he might be testifying.

Mr. Colvin: It is an assumption of counsel that the witness was in the conspiracy."

The Court granted the motion to strike said testimony, to which motion, counsel for the defendant Blumenthal duly Excepted.

XXIII.

The said District Court erred in denying the motion of counsel for the defendant Blumenthal to strike out the following testimony, given by the witness Harkins, upon the ground that it was hearsay, and not binding upon the said defendant, to which ruling counsel for the defendant Blumenthal duly Excepted: [80]

"Mr. Weiss stated that it was true that he re-

received half of the \$2.00 cash paid to the Francisco Distributing Company for clearing this whiskey through their books, and he finally refused to answer who actually owned the whiskey. He said that 'I don't want to involve myself'. Mr. Weiss said he knew Mr. Blumenthal. He said he knew Mr. Blumenthal, but he refused to stated to the best of my recollection, and positively, whether Mr. Blumenthal was the owner of the whiskey or not."

XXIV.

That the said District Court erred in overruling the objections to the admission of all the evidence and exhibits in the case against all the defendants, which said objections and motions and the specific grounds therefor were stated by Mr. Friedman, counsel for the defendant Feigenbaum, and were adopted by counsel for the defendant Blumenthal, which said objections and motions and the said rulings of the Court thereon from the record and proceedings herein fully and at large appear, and to which rulings of the Court thereon, counsel for the defendant Blumenthal duly Excepted.

XXV.

That the said District Court erred in denying the motion of counsel for the defendant Blumenthal for a directed verdict, which said motion and ruling of the Court thereon, and the exception of counsel for the defendant Blumenthal are in words and figures following, to-wit:

"Mr. Riordan: If your Honor please, I would like to adopt for the defendant Blumenthal the [81]

particular motions just made by Counsel Friedman and Counsel Dunne, substituting therefor also instead of the particular witnesses named with respect to extrajudicial statements the failure to establish the corpus delicti evidence to apply to the witnesses Lombardi, Fingerhut and Travis. I do that in that manner to save the time in repeating those motions and therefore I adopt all of the motions heretofore made. And I would like to for the defendant Blumenthal add the following motions:

In behalf of him, I make a motion for a directed verdict for the defendant Blumenthal on the grounds that the said indictment does not state facts sufficient to constitute a crime or offense against the United States of America.

Second, that the maximum Price Regulations 193 and 445, which the said indictment charges that this defendant, namely, Blumenthal, conspired to violate, are, and each of said Regulations is, so indefinite, uncertain, that it is impossible to determine what is meant thereby, or what acts are prohibited thereby, and in part it is impossible to ascertain what price it was lawful at the time mentioned in the said indictment to sell the whiskey referred to in the said indictment and by reason of which the said Regulations are void; that a conviction under the said indictment would be in violation to the Fifth Amendment of the United States in that no person shall be deprived of life, or property, without due process of law, and that this [82] Honorable Court, I say respectfully, has no jurisdic-

tion to hear this cause, or put the defendant to trial on the indictment.

Second, that the Regulation 445, which under its terms, at a date subsequent to the transactions involved in this indictment relative to Rocking Chair Whiskey, namely, the dates of December 1943 and January 1944, was not passed and in effect until May of 1944, and that it is an attempt upon the part of the Administrator and those adopting the regulation to create an ex post facto law.

I further want to make the point, if your Honor please, without arguing it, at least at this time, that the provisions under this special act, out of which these Regulations 193 and 445 are created, and the general Act itself, the so-called Office of Price Administration Act, has all of the elements in it that allow a transaction of this nature, and that no other Act or law of the United States, whether it be civil or criminal other than the exceptions contained in that Act, can be used.

I particularly call that to your Honor's attention because I intend to stand seriously by the point that under the general act there is a provision which sets forth that no violations of the Price Administration can be had by any parties by agreement or otherwise—I am using the general language in there—but an agreement is a conspiracy or a synonym. The lawmakers then go on to set up a structure between Federal officials who can be charged and convicted for a felony. All other persons in the United States [83] can only be convicted of a misdemeanor, and then the Act goes

on to provide in the third section that any act inconsistent with this general OPA Act shall have no force and effect. And, while normally, at first glance, that might seem very peculiar, that you could toll the famous Conspiracy Statute, the specialty acts of this nature for a period of time, the last twenty or thirty years at least, have been laying distinct lines of charges and punishment where they put teeth into those so-called Acts, and while it has never been before the higher Courts, at this time I raise that point very seriously before your Honor."

The Court: I will deny that motion, and you may have an Exception.

Mr. Riordan: Exception.

XXVI.

That for the reasons set forth by counsel for the defendant Blumenthal in the assignment next immediately preceding, the said District Court erred in denying the motion of counsel for the defendant Blumenthal at the conclusion of the entire case, and after both sides had rested for an instructed verdict of not guilty, to which ruling of the Court, counsel for the defendant Blumenthal duly Excepted.

XXVII.

That the indictment in the above entitled cause, for all and singular, the reasons set forth in the demurrer to said indictment and the motion to quash the said indictment, filed by the defendant Harry Blumenthal was a nullity, and the said D

trict Court had no jurisdiction to hear and determine the [84] said indictment, or to try the said defendant thereon, or to pass judgment upon the said defendant, and that all and singular, the proceedings aforesaid were and are, a nullity; that the evidence taken and had upon the trial of the above-entitled cause was, and is, insufficient as a matter of law, to establish the guilt of the defendant Harry Blumenthal of the purported offense attempted to be charged in the said indictment, or of any other crime or offense against the United States of America, or of any conspiracy to commit any crime against the United States of America, or to violate any Regulation or purported Regulation of the Price Administrator.

Wherefore, said defendant Harry Blumenthal prays that the aforesaid judgment and sentence of the said District Court be reversed, and that he go hence sine die.

Dated: July 17, 1945

(Signed) MORRIS OPPENHEIM

Attorney for defendant and appellant, Harry Blumenthal.

(Acknowledgment of Service.)

[Endorsed]: Filed July 20, 1945. [85]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS OF DEFENDANT
ALBERT FEIGENBAUM

Now Comes Albert Feigenbaum, one of the defendants, and appellants in the cause numbered and entitled as above, who has heretofore appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment and sentence given, made and entered against him in said cause in and by the said District Court, and having duly given his notice of appeal in the manner and form provided by law, and by the Rules adopted and promulgated by the Supreme Court of the United States governing appeals in criminal cases, files this, his assignment of the errors upon which he will rely for a reversal of the judgment and sentence aforesaid, and says, that in the record and proceedings aforesaid, as also in the judgment of the plea herein, manifest error hath happened to the grievous damage of him, the said Albert Feigenbaum, in each and every of the following particulars, to-wit:

I.

That the indictment on file in the above-entitled cause does not state facts sufficient to constitute any crime or offense against the United States of America.

II.

That the said indictment does not state facts sufficient to charge this defendant Albert Feigen-

baum with any crime or offense against the United States of America.

III.

That the said indictment does not state facts sufficient to charge this defendant Albert Feigenbaum, and does not charge this defendant with any crime or offense against the United States of America, or with any conspiracy to commit any crime or offense against the United States of America. [87]

IV.

That said District Court erred in granting the motion of counsel for the United States of America, made at the conclusion of the Government's case in chief, to admit all evidence which theretofore had been admitted against any defendant as against all defendants and to admit all documents, theretofore marked for identification in evidence against all the defendants, to which ruling of the said District Court counsel for this defendant Albert Feigenbaum duly Excepted.

V.

That the evidence in the case was and is insufficient to establish the offense alleged in the indictment as against the defendant Feigenbaum.

VI.

That the said District Court erred in denying the motion of said defendant Albert Feigenbaum for a new trial, to which ruling and order of the said

District Court counsel for this defendant Albert Feigenbaum duly Excepted.

VII.

That said District Court erred in denying the motion of said defendant Albert Feigenbaum in arrest of judgment, to which order and ruling of said District Court counsel for said defendant Albert Feigenbaum duly Excepted, said motion being made on the following grounds:

1. That said indictment does not state facts sufficient to constitute an offense under or against the laws of the United States.

2. That it appears from the record that judgment if made and entered would be unlawful.

3. That from the record it appears that the above entitled Court did not have jurisdiction over the offense sought to be alleged in the indictment.

4. That the indictment is not sufficient in form or substance to enable this defendant to plead the judgment in bar of another prosecution for the same offense.

VIII.

That the said District Court erred in admitting in evidence over the objection of counsel for the defendant Feigenbaum the following testimony of the witness Fred A. Sander:

"The Witness: I sent a bill for the services which my company rendered in this matter.

Q. To whom did you send the bill?"

Counsel for the defendant Feigenbaum objected to the question upon the ground that the same was self-serving. The Court overruled the objection, to which ruling counsel for the defendant Feigenbaum duly Excepted.

"The Witness: We sent our invoice to the Francisco Distributing Company".

IX.

That the said District Court erred in giving the following instruction to the jury during the course of the examination of the witness Joseph N. Nathanson:

"The Court: I will instruct the jury at the present time that pursuant to the authority given to him by statute, the Price Administrator, on May 22, 1943, promulgated an Order No. 5 in which he fixed the maximum prices for all sales by Ben Burke Inc., Foster & Company, and American Distilling Company, as follows: [89]

That on or after May 24, 1943, Ben Burke, Inc., Boston, Mass., Foster & Company, New York City, and American Distilling Company, Beacon, Illinois, may sell and deliver to any person, and any person may buy and receive from those sources, Old Mr. Boston Rocking Chair Whiskey, a blend of Straight Bourbon Whiskies, 80.6 Proof, aged as above, at the following prices: \$19.24—that is not in issue; that is another kind of whiskey?

Mr. Colvin: That is for pints.

The Court: \$15.37, plus \$3.87, being the amount of the increased Federal Excise Tax of November

1st, 1942, applicable thereto, or a total of \$19.24 per case of 12 bottles, each bottle containing one-fifth gallon of such whiskey.

Now, do you wish to take an exception to that?

Mr. Friedman: Yes, your Honor, I wish to object to what your Honor has told the jury, and I ask your Honor to instruct the jury to disregard anything you have just read from the Federal Register or advised them about, upon the following ground:

First: that the purported order is only an order that regulates processors of these particular distilled spirits. It has nothing to do with wholesalers. It has nothing to do with people who buy from wholesalers or jobbers—that is the portion you have instructed the jury about, and therefore this portion of the order is not binding upon Mr. Feigenbaum in this case, and who is neither a processor or a wholesaler of distilled spirits.

Secondly: upon the ground that the order on its face is in violation and in excess of the [90] power conferred by the Emergency Price Control Act for these reasons; that under the Price Control Act, the Administrator has the power by general order and by general order only, to fix the prices of any commodity within the particular area or region, and that he has not the power, and never was given the power by Congress to fix different prices for different people for the manufacture of the same kind of article, and this is an order applicable only to certain people.

The Court: Do you propose to follow this up.

with further regulations with respect to the prices fixed for sale to wholesalers?

Mr. Colvin: Yes, your Honor.

The Court: And this is preliminary to that?

Mr. Colvin: Yes, your Honor.

The Court: I will overrule the objection and an exception will be noted."

X.

That the said District Court erred during the examination of the Witness John Giometti in overruling the objection of said defendant Feigenbaum to the following question:

"Q. At that time did you give any cash to Norman Reinburg?" and in permitting the said witness to answer as follows:

"I gave him the balance of the \$65 a case."

:(To the Court): \$2,025."

The objection was made on the ground that such evidence was not binding on the defendant Feigenbaum. An exception was noted.

XI

That the said District Court erred in admitting the following evidence and in making the following rulings during the [91] examination of the witness Henry L. Taylor, over the objection of counsel for the said defendant Feigenbaum:

"The Witness: I had a conversation with Mr. Feigenbaum. That conversation took place at the drugstore which I mentioned. Besides Mr. Feigenbaum and myself, my wife and Mr. Humes were present, and there were two other parties there.

Q. What was that conversation regarding the purchase of whiskey?

Mr. Friedman: We object to that on the ground it is incompetent, irrelevant and immaterial, the corpus delicti has not been laid, and until the corpus delicti is established, any acts, declarations or statements of a defendant or an alleged co-conspirator are inadmissible.

The Court: I will overrule the objection. He is asking for the conversation as to the purchase of the liquor.

Mr. Friedman: Exception.

The Witness (Continuing): I don't recall what Mr. Feigenbaum said. I do not recall the exact words.

(To the Court) I bought some whiskey from this man. We went out there to buy this whiskey, and he told us how much it was. We gave him a \$500 deposit prior to that, and he said if we hadn't shown up, why, we would have lost that \$500. We went out into this man's place of business, and I had a talk with him. He said he would give us the whiskey. He did not tell me what kind of whiskey at that time. He told me the price would be \$64.00. We said we would take it. He wanted us to take 200 cases. So we finally thought we would take 200 cases. So we took 100 cases instead of the 200. At [92] the beginning of the conversation, I told Mr. Feigenbaum we would take 100 cases. He wanted us to take 200 cases. I told him we would if we could afford it. We finally made a deal for the 100 cases. He had us to make out a check to

the Francisco Distributing Co. for \$4900. That conversation took place on December 9 at the Sunset Drug Store on Mission Street, San Francisco, around 21st Street. A gentleman by the name of "Little Joe," and another fellow by the name of Tucker, were present beside Mr. Feigenbaum, Mr. Humes and myself. We were introduced to Mr. Feigenbaum, Mr. Humes, and myself. We were introduced to Mr. Feigenbaum, and he said it was lucky we came down, or we would have forfeited the \$500. We said we were anxious to come down and save our \$500, and we was anxious to get the whiskey. We told him we were from Cottonwood, Shasta County. Mr. Humes and myself were introduced to Mr. Feigenbaum by this man "Little Joe." He said he would get us the whiskey and the price was \$64, and he had us make him a check to the Francisco Distributing Company. That was per case for 100 cases. We told him we would take 200 if we could. If I couldn't, why he would take the 100; he would keep the other 100. He wanted to bill 200 cases against our license. He said he could take the other 100 if we didn't take it. He said he would run it in on our license. He had me make him out a check; that is, I had to go out and get my wife at the car, and she came in and made the check to Mr. Feigenbaum. I had left her at the car outside. Mr. Feigenbaum instructed my wife how to make the check out.

The check shown me, entitled, "R. M. and H. L. Taylor, Pay to the order of Francisco Distributing Company, \$4900," is the check my wife made out

at that time. It was written and signed by Mrs. Ruth Taylor in my presence. He instructed her [93] to make it to the Francisco Distributing Company for \$4900.

The said check was marked for identification as U. S. Exhibit 24.

The Witness: (Continuing) She made the check out for \$4900, and he had us give him \$1.050 in cash. I gave the money to Mr. Feigenbaum. We discussed the 200 cases and finally we took the 100 cases. It was finally said if we did not take the 200 cases he would take the other 100 cases. I do not think anything else was said at that time and place in that conversation."

XII.

That the said District Court erred during the examination of the said witness Henry L. Taylor in admitting the following testimony over the objections of counsel for the defendant Feigenbaum:

"I had a conversation with the man to whom I gave the check which took place on the street in front of this bar. Besides myself and Little Joe this man and Mr. Tucker were present. [94]

Q. What was the conversation?

Counsel for the defendant Feigenbaum objected upon the ground that the conversation was not binding upon the defendant Feigenbaum because it was conversation occurring out of his presence. The Court overruled the objection, to which ruling counsel for the defendant Feigenbaum then and there duly Excepted.

The Witness: In that conversation, Little Joe said he could get us some whiskey and we said we would take it. We said we would give him a deposit of \$500 and he would make a deal, getting us the whiskey. At that time he did not tell us what kind of whiskey it was. There was 100 cases mentioned at the time. We gave him the \$500 in the street and he agreed to get this whiskey in about a week's time. That was all of the conversation at that time and place."

XIII.

That the said District Court erred during the examination of the said witness Henry L. Taylor in admitting the following testimony over the objection of counsel for the defendant Feigenbaum:

"I had a conversation with Mr. Feigenbaum on that day at the Sunset Drug Store. My wife was not with me during that conversation. Only Mr. Feigenbaum and myself were present.

Q. What conversation did you have with Mr. Feigenbaum on that date regarding the whiskey?

Mr. Friedman: I will object to that on the ground it is incompetent, irrelevant and immaterial; the proper [95] foundation is not laid. We have no proof of the corpus delicti or for an act, statement or declaration of an alleged co-conspirator.

The Court: Objection overruled. Exception noted.

(The Witness Continuing): I had a conversation with him. I asked him, 'Where is our whiskey?' We were worried about it; we hadn't heard anything from this liquor so he told us it would be

in soon and it would be shipped to us. At that time he told us the name of the whiskey was the Old Rocking Chair, and he showed me a bottle he had in his desk drawer. That was a fifth. I did not open the bottle there. I asked him what kind of whiskey it was, and how good it was, and I made a deal with him to buy a case of whiskey to take down to Los Angeles with me. That was, in addition to the other purchases. I paid him \$64 for that case in cash. I told him I would take the 100 cases and he wrote a check out to me, and I endorsed it back to him. He wrote a check for \$2,450. He asked me to endorse that so that would put him in the clear.

(To the Court): They would give us instead of taking 200 cases which we were billed for the \$4,900. That would give us just the 100 cases for \$64 a case so he wrote the check for \$2,450 and had me endorse it back to him. He signed that check in my presence. I did not receive any cash for it when I endorsed it. I told him I had to be going; I was going to Los Angeles and we wanted to get our whiskey as quick as we could. We gave him the instructions previous to that. [96] I had no subsequent dealings with him."

XIV.

That the said District Court erred in admitting the following evidence and making the following rulings thereon during the examination of the witness Ruth Taylor over the objection and exception of counsel for the said defendant Feigenbaum:

"There was a discussion about writing the check.

Q. What was that discussion?"

Mr. Friedman objected to the question on the ground that it was incompetent, irrelevant against defendant Feigenbaum, and that it called for acts, declarations and transactions participated in and performed by defendant Feigenbaum when the substance of the offense charged had not yet been established.

The Court overruled the objection, to which ruling counsel for the defendant Feigenbaum duly excepted.

The Witness: Mr. Feigenbaum told me to make it out to the Francisco Distributing Company for \$4,900. I asked if we would get a receipt for it, and he said the check would answer as a receipt. I did not have any other transaction; I didn't hear any of the transactions of the persons present except I wrote out a check for that amount of money and he said the check would act as a receipt."

XV.

That the said District Court erred during the examination of the witness Raymond C. Humes, in admitting the following evidence over the objection of counsel for the defendant Feigenbaum, and in making the following rulings thereon: [97]

"Q. What was the conversation you had with Mr. Feigenbaum?"

Mr. Friedman objected to the question upon the ground that it called for the act, or declaration of payment (sic; or statement) on the part of an

alleged co-conspirator in the case and that there was no proof of the corpus delicti.

The court overruled the said objection, to which ruling counsel for defendant Feigenbaum duly Excepted.

"The Witness: We were introduced to Mr. Feigenbaum by Little Joe, and Mr. Feigenbaum wanted to know what we would have, and we told him we wanted 100 cases of whiskey. He said this, 'I think I can get it for you'. Nothing was said about the deposit right at that time. He said he would get us 100 cases of whiskey and he would have to have a check for it for \$24.50 per case. He said the whiskey altogether would cost us \$64 per case. It was then that I had the discussion about the \$500 I had paid. He said it was a good thing we got down on that date, or we would have forfeited the \$500. Mr. Feigenbaum said that. We had a conversation then about the number of cases we were going to take. We were talking about 100 and Feigenbaum wanted to know if we could take 200. I thought it was a little too steep for myself, and I said that. Then, Mr. Taylor and him and I got talking about how we could use the 200 so we were to make out the check for 200 cases, which was \$4,900. The check for \$4,900 was made out after our statement that maybe we could take 200. We asked him about the whiskey, if we could take the whiskey up on a truck with us to [98] Cottonwood. He said the whiskey wasn't in. He said it would be about a week or ten days; that the whiskey would come in on a car and that they

would send it up by truck. If not, we would receive it by freight. We asked him where the distributor was, and he didn't say. He asked 50c a case to pay for the freight. He was paid an amount of money for the freight in addition ~~to the 500~~ deposit and the check for \$4,900. He was paid the further amount of \$1,050. Mr. Taylor paid that money to Mr. Feigenbaum in my presence. Mr. Feigenbaum then said he wanted a check for \$24.50. He said that went to the distributor. He said we would have to come through with \$1,050 in cash. I think that is about all the discussion at that time."

XVI.

That the said District Court erred in admitting the following evidence during the examination of the witness Walter J. Vogel and in making the following rulings thereon:

"Q. Did you give any cash to this man in addition to this check?"

Counsel for the defendant Feigenbaum objected to the question upon the ground that no foundation for the asking thereof had been laid. The Court overruled the said objection to which ruling counsel for the defendant Feigenbaum then and there duly Excepted.

"The Witness: I did not give any cash at that time to this man. I gave him the check. After he brought me the bills I gave him the cash. He told me I would [99] have to pay him for getting the whiskey. I have seen this document entitled

"Francisco Distributing Company No. 10092". I received this document from that man about an hour and a half or two hours after I gave him the check. He came back with this. Both of these transactions took place on the same day which was December 6, 1943. When he came back about an hour and a half later, I am sure he was the man to whom I had given the check. I think I gave him \$3,400 in cash. I paid \$24.50 for the whiskey. That was for 100 cases.

(To the Court): I mean \$2,450, or \$24.50 a case for 100 cases."

XVII.

That the District Court erred in granting the motion of the Government, made at the conclusion of the Government's case, to admit as against the defendant Feigenbaum all of the evidence that had theretofore been admitted against one or more of Feigenbaum's co-defendants as more fully appears as follows, to wit:

Mr. Colvin: Your Honor, for the sake of the record, I take it that the record will show that the Government does offer all evidence which has been admitted against any defendant as against all the defendants, and that further, the Government now makes an offer of all documents marked for identification to be admitted against all the defendants.

The Court: I take it that is the motion to be argued.

Mr. Friedman: That is the way I understood the record.

Mr. Colvin: I further move that the documents, 1 to 14, inclusive, I believe, which have been admitted against individual defendants be admitted as against all.

Mr. Friedman: I understand that the motion, concretely, of the Government at this time is that all testimony and all documents, irrespective of how they came into the record up to this time, be now admitted against all defendants. [100]

Mr. Colvin: That is the motion.

The defendant Feigenbaum objected generally and specifically to the admission of such evidence including the exhibits and documents which objection and objections were overruled by the Court and to which ruling and rulings said defendant Feigenbaum duly excepted as more fully appears from the record as follows, to wit:

Sub-Assignment, A

We object to the admission in evidence against the defendant Feigenbaum of the testimony of Sander as to any conversations he had with Weiss upon two grounds: [101] First, that part of that conversation and alleged utterances by Weiss were narrative of past events, and upon the second ground that they are declarations of an alleged co-conspirator made out of the presence of Feigenbaum, that they are hearsay, that the corpus delicti of the conspiracy has not been established, and that there is no evidence to show that Feigenbaum was a member of that conspiracy, and therefore the statements, acts and declarations of a co-conspirator

made out of his presence cannot be admitted in evidence against him for any purpose.

Sub-Assignment B

The defendant Feigenbaum objects to the admission in evidence against him of any of the testimony given by the witness Giometti on the ground that it is hearsay, that it calls for acts and declarations of third parties out of the presence of the defendant Feigenbaum and even the acts and declarations of people that Feigenbaum never even knew or heard of, given at another time, and upon the further ground that the corpus delicti has not been established, and that therefore these matters cannot be competent evidence against Feigenbaum. And during the course of Mr. Giometti's testimony there was introduced for identification Government's Exhibit No. 24, which was an invoice, and Government's Exhibit No. 25, which, I think, was a freight bill, or waybill, of some kind or other. And we object to the admission of Government's Exhibits 24 and 25 in evidence against the defendant Feigenbaum on the ground that they are hearsay, proof of the conspiracy has not been established, that the connection of the defendant Feigenbaum with [102] such conspiracy has not been established at all.

Sub-Assignment C

First having objected in general to all the testi-

mony of Giometti, we now object to this specific portion of Giometti's testimony going into evidence against the defendant here upon the ground that it is incompetent, irrelevant and immaterial, that the corpus delicti of the offense has not been established, and it calls for acts and declarations between third persons made out of the presence of the defendant Feigenbaum, and there is no proof he was a member of any conspiracy, or that he authorized, had knowledge of, or ratified any such conversation or acts on the part of Abel.

Sub-Assignment D

So far as the testimony of Mr. Reinburg is concerned we object to the admisison in evidence against the defendant Feigenbaum of the testimony given by Mr. Reinburg upon the ground it is hearsay, upon the ground it calls for acts, transactions and events occurring out of the presence of the defendant Feigenbaum, that the corpus delicti of the offense has not been established, and there has been no evidence tending to establish the connection of Feigenbaum with any conspiracy charged or contained in the indictment filed herein, and that the testimony of Mr. Reinburg, so far as any acts, transactions or events he had with the defendant Abel are concerned, that the acts and statements and declarations of the defendant Abel are not binding upon the defendant Feigenbaum for the reasons I have stated.

Sub-Assignment E

During the examination of Mr. Reinburg there was offered for identification Government's Exhibits 22, 23, 34, and 35, 22 and 23 being bills and invoices, 34 and [103] 35 being checks, and we object to the admission of each of these exhibits in evidence as against the defendant Feigenbaum for each and all of the reasons that we have urged against the admission of the testimony of the defendant Reinburg and the testimony of the defendant Giometti, and upon the further ground that the proper foundation for none of these four documents has been established, and that there was no proof, first, as to the bills and invoices, that they were issued by the Francisco Distributing Company, and secondly, there was no proof that the checks written and given by Giometti and by Reinburg were ever received by the Francisco Distributing Company, or cashed by them. Again I confine, of course, the evidence as it appears against the defendant Feigenbaum.

Sub-Assignment F

I object to the admission in evidence against Feigenbaum of any testimony given by the witness Figone on all the grounds I have heretofore urged as to the admission of some of the testimony, that it is hearsay, that the corpus delicti of the charge has not been established; there is no independent evidence to show that there was a conspiracy, or that Feigenbaum was a member thereof, other than

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testimony as to the acts and declarations of alleged co-conspirators; that the testimony as to all those transactions and events occurring out of the presence of the defendant Feigenbaum, they are not binding on him, there being no proof he authorized, sanctioned, or even had knowledge of such transactions. [104]

Sub-Assignment G

“Mr. Friedman: I think this morning I objected to the Reinburg and Giometti testimony, to the Figone and the Avila testimony, as I recall it, and Exhibits Nos. 26 and 27, the check and invoice that were admitted on Figone's testimony. As to Figone, Avila, and these two exhibits, of course, Feigenbaum objects to their admission in evidence against him on all the grounds previously stated, and on the ground they are hearsay as to him; no foundation has been laid for the check or invoice establishing who actually received and deposited the check or who made the invoice; and that the corpus delicti has not been established, there being no proof that Feigenbaum was a member of any conspiracy, and there being no proof of any conspiracy, at all.

Sub-Assignment H

As to the witness James Cermusco, upon whose testimony there were marked for identification Exhibits [105] 27, 28, 29, 30, 31, 32 and 33, I object to the introduction against the defendant Feigenbaum of Cermusco's testimony on the ground it is

hearsay, the corpus delicti has not been established, it calls for acts, declarations and events by a third person out of the presence of Feigenbaum. It is not binding upon him, and I object to the admission in evidence of Exhibits 28 to 33, inclusive, upon the same grounds, and likewise upon the ground that no foundation has been laid for such checks, in that there was no proof as to who received or cashed them. There is no proof as to who issued the invoices.

Sub-Assignment I

Upon the same grounds I move to strike out the testimony of Vukota and Lewis on the ground it is hearsay twice removed. These men, the testimony shows, dealt only with Cermusco. They never saw anybody named as a defendant in this case and, as I recall it, anybody connected with the Francisco Company. Their acts, statements and declarations are hearsay as to Feigenbaum, acts and declarations out of his presence, over which he had no control; the corpus delicti of the offense charged has not been established, and that there has been no independent proof identifying Feigenbaum with the conspiracy charged.

Sub-Assignment J

The next set of witnesses—and I can deal with them jointly—are Henry L. Taylor, Ruth Taylor and Raymond C. Humes. This testimony was admitted as to Feigenbaum and at this time I am going to move to strike it out on the following grounds, to-wit, that such testimony of these three witnesses, all dealing with the same event, is en-

tirely immaterial and incompetent, for the [106] reason that the corpus delicti of the offense has not been established, and upon the further ground that all this showing was an independent, isolated transaction wherein Mr. Feigenbaum agreed to act as the agent for Mr. Taylor and Mr. Humes for the purchase for these people of 200 cases of whiskey, and that that was the agreement between the parties, and there was no agreement between Feigenbaum and either Taylor or Humes, or both of them, that Feigenbaum was to sell to either of these parties any whiskey.

Sub-Assignment K

On like grounds I move to strike out U. S. Exhibit 34, the check for \$4,900 testified to as having been written by Mrs. Taylor and delivered to Feigenbaum; and United States Exhibit No. 35, the invoice that was involved in that transaction.

Sub-Assignment L

I object to the admission in evidence of the testimony of Walter G. Vogel, together with U. S. Exhibits 45 and 46, which were introduced and marked for identification upon his examination. You will recall that Vogel testified that some strange and unidentified man came into his place and offered to sell him whiskey at \$24.50 per case for the Distributing Company demanding a brokerage for all over that amount. There is absolutely no evidence that this man, Vogel knew anybody connected with the charge in this indictment whatso-

ever, and Vogel's testimony relates to an incident — clearly *res inter alios acta*, hearsay as to the defendant Feigenbaum, the proof of the *corpus delicti* of the offense has not been established and it calls for acts and transactions out of the presence of Feigenbaum, without any evidence to show that he knew, sanctioned approved or ratified or authorized such transaction, [107] and that goes to the two exhibits 45 to 46, as well as to Vogel's testimony.

Sub-Assignment M

I likewise object to the introduction in evidence against Feigenbaum of the testimony of Francis Duffy, together with United States Exhibits 47, 48 and 49, consisting of two checks and an invoice that were marked for identification upon Duffy's examination. The testimony shows that Duffy, who operated a tavern — a man came in, whom he couldn't identify, as I recall it; that he bought from this man 100 cases of whiskey at \$24.50 and paid the man a premium of \$20 a case, gave him a check for \$2,000, a check for \$2,450. The invoice came in, the name of the payee on this check was left in blank, filled in by the man after he went away. The testimony of Duffy is wholly incompetent, absolutely hearsay, *res inter alios acta*, calls for transactions and events out of the presence of the witness Feigenbaum which he is not shown to have sanctioned, ratified or confirmed, authorized, or approved in any way; that the *corpus delicti* of the charge of the indictment has not been established, or any evidence to show that he was a member of any conspiracy.

Sub-Assignment N

I object to the introduction in evidence of the testimony of Angelo Lombardi; together with U. S. Exhibits 50 and 51, which consist of a check written by Lombardi to a man named Minkler and an invoice. Lombardi testified that in Santa Rosa he bought 100 cases and gave some cash to Mr. Blumenthal for it. Minkler contacted him about the whiskey. He went to San Francisco and talked to some man there, and so forth. That later on, on the 20th. of December, he came to the Sportorium [108] with Minkler. He went into a back room and paid Blumenthal some money. I will object to this testimony the check, and the invoice, upon the grounds I have heretofore stated, that the matter is purely *res inter alios acta*, is not binding on the defendant Feigenbaum, calls for acts, transactions and events out of his presence, over which he has no control, and they are not binding on him; the *corpus delicti* has not been established, and in this case, as in the others, it calls for the acts and declarations of a co-conspirator made out of the presence of Mr. Feigenbaum, and it is inadmissible, as these other matters are inadmissible for any purpose until the *corpus delicti* has been established by independent testimony. On the same grounds, I object to the introduction in evidence of the testimony given by Herman Fingerhut together with exhibits 53, 54, 55, 56 and 57, introduced upon his examination. Fingerhut owned a cafe in Vallejo. He said on December 3rd and 4th he saw Blumenthal, bought 200 cases of whiskey at \$55; that later he

and Mr. Travis went to the Sportorium and had another deal with Blumenthal.

Sub-Assignment O

I object to the testimony of this witness upon all the grounds I have heretofore stated. It calls for the declaration and conduct of an alleged co-conspirator, Blumenthal, out of the presence of the defendant Feigenbaum, and without any independent proof of the corpus delicti or of Feigenbaum's connection with the alleged conspiracy; upon the further ground it is hearsay, not binding on the defendant Feigenbaum; it constitutes acts that were done without his knowledge, consent, ratification or approval. [109]

Sub-Assignment P

I object to the introduction in evidence of the testimony of Walter Travis, together with Government's Exhibits 58, 59 and 60, consisting of two invoices and a freight bill. The testimony of Walter Travis was the same as that of Fingerhut except that in the first deal Fingerhut took 100 and Travis took 100, and in the second hundred, 75 were for Travis and 25 for Fingerhut.

I object to the introduction of this testimony and the three exhibits I have designated, upon all the grounds I have objected to the testimony of Fingerhut and the checks and invoices involved in Fingerhut's testimony.

Sub-Assignment Q

I object to the testimony as against the defendant Feigenbaum, of the testimony given by the witness A. P. Jones. Mr. Jones, as I recall, testified to certain Alcohol Tax Unit forms 52-A and 52-B, which were marked Government's Exhibit No. 2 and Government's Exhibit No. 3, and Government's Exhibits 4, 5 and 6. These forms were introduced for the purpose of showing the purchase or lack of purchase of certain whiskey by the Francisco Distributing Company during certain months. I object to those forms being in evidence against Feigenbaum, on the ground they are res inter alios acts. They constitute hearsay as to him. No proper foundation has been laid as to any of these forms, and there is no proof they were executed by any alleged conspirator in this case; that they are hearsay as to Feigenbaum, and that they cannot be considered for any purpose in determining his guilt or innocence.

Sub-Assignment R

I object to the introduction in evidence against Feigenbaum of the testimony given by the witness Robert [110] Grubbs. Robert Grubbs was connected in some way with Santa Fe Railway, and he testified to Government's Exhibits 7 and 8, and I object to the introduction of such exhibits in evidence, consisting of two freight bills for two carloads of whiskey, on the ground the matter is purely hearsay as to the defendant Feigenbaum. They are acts, transactions and events out of his knowledge, pres-

ence or hearing. It is not shown he knew of, ratified, confirmed, authorized or approved, and these matters are wholly incompetent to be considered in determining the guilt or innocence of the defendant Feigenbaum.

Sub-Assignment S

I likewise move to strike out the testimony of Fred A. Sander, or rather, I object to the admission of the testimony of Fred A. Sander in evidence against the defendant Feigenbaum, together with United States Exhibits 9, 10, 11 and 12, which were introduced and marked upon the examination of this witness; upon the ground that the testimony of Mr. Sander, who was connected with the San Francisco Warehouse and executed two warehouse receipts, and testified as to certain instructions as to the disposal of the contents of the cars which he said were represented by those receipts supposed to have been given to him by the defendant Weiss. I object to all the testimony and all these exhibits I have enumerated, upon the grounds that as to the defendant Feigenbaum it is wholly incompetent, irrelevant and immaterial and hearsay as to him, not binding upon him; that there has been no proof of the *corpus delicti* or the defendant's connection with any conspiracy, or the conspiracy set forth in the indictment. [111] These matters are merely *res inter alios acta*, and I object to their admission. Additionally, I object to the admission of that portion of Mr. Sander's testimony which has to do with conversations he said he had with the defendant Weiss, on December 15th and December 17th,

relative to delivery orders, invoices, and what was to be done with these two cars of whiskey; upon the grounds that that evidence constitutes the acts, declarations and statements of an alleged co-conspirator, made out of the presence of the defendant Feigenbaum, and there being no proof of the corpus delicti, the same as that binding on the defendant Feigenbaum.

Sub-Assignment T

I likewise object to the introduction in evidence against the defendant Feigenbaum of United States Exhibits 13 and 14, which have to do with certain invoices of a carload of whiskey out of a B & O Railroad car, upon all the grounds I have objected to the other portions of the admission of the other railway receipts and instructions, as testified to by Sander under the prior exhibits; and additionally, I object to the admission against Feigenbaum of the testimony of the witness Sander relative to a conversation he said that he had with Weiss on January 3, 1944, in which the invoices were received by Weiss, and in which Weiss told him to do something about the delivery on the ground that the testimony as to the acts and declarations of an alleged co-conspirator is inadmissible and not binding upon Feigenbaum, and there has been no independent proof of the corpus delicti of the offense, or Feigenbaum's connection with any alleged conspiracy. [112]

Sub-Assignment U

I object to the admission in evidence against the defendant Feigenbaum of the testimony of the witness Frank Dito, of the Bank of America, and likewise the admission in evidence against the defendant Feigenbaum of United States Exhibits 16, 17, 18, 36, 37, 38, 39, 40, 41, 42, 43, 44 and 45. I object to all these matters in the testimony of Dito upon the ground they all have to do with the bank account and the affairs of the Francisco Distributing Company. They are matters and things of which the defendant Feigenbaum is not shown to have had any knowledge, any control over, acts and things done out of his presence, hearsay as to him, and that in every instance no foundation has been laid for the introduction of any of these documents, checks or statements that were introduced under Dito's testimony, for the reason that there has been no preliminary proof as to the endorsers or depositors, and so forth, of the account. And that includes the so-called signature cards, which is supposed to have been the one with which the account was opened for the Francisco Distributing Company in the name of Goldsmith and Weiss. I object to that, which is Government's No. 15, particularly upon all the grounds I have heretofore stated in discussing the exhibits admitted under the testimony of Frank Dito, and upon the further ground that no foundation for the signature card has been presented so far as the defendant Feigenbaum is concerned, and there is no proof that either Goldsmith or Weiss signed or executed the same.

Sub-Assignment V

I move that there be excluded, and if it has been admitted, that there be stricken out, so far [113] as the defendant Feigenbaum is concerned, and there is no proof that either Goldsmith or Weiss signed or executed the same.

Sub-Assignment W

I move that there be excluded, and if it has been admitted, that there be stricken out, so far as the testimony of the witness Joseph Nathanson is concerned, any computation of the figures he has given of the so-called ceiling price under the Emergency Price Control Act of whiskey is concerned, on the ground, it is not the subject of expert testimony I think I have covered them all.

The Court: The various motions to strike will be denied and exceptions noted. The court will adhere to its ruling that the evidence and the exhibits will be admitted against all the defendants, save in the case of the testimony of the last witness, Mr. Harkins, whose testimony will be admitted as it relates to conversations with the defendant Goldsmith as to him, and with respect to conversations with the defendant Weiss as to him, Mr. Weiss, and with respect to both of them, where the conversations were had with both of them.

Mr. Friedman: Our exceptions to each ruling are noted. (Emphasis supplied)

XVIII.

That the said District Court erred in denying the

motion of counsel for the defendant Feigenbaum to strike from the record the testimony of the witnesses James Cermusco, John Vukota and V. M. Lewis, insofar as the defendant Feigenbaum was concerned, to which ruling of the Court counsel for the said defendant Feigenbaum duly excepted. [114]

All as more fully appears from the record as follows:

Mr. Friedman: I will likewise on the same grounds and for the same reasons move that the testimony of witness James Cermusco, John Vukota and V. M. Lewis be stricken, so far as the defendant Feigenbaum is concerned, upon all the grounds urged against the admission of such testimony, and upon the further ground that the testimony of these three witnesses merely concern the extrajudicial statements and acts of an alleged co-conspirator, said and done out of the presence of the defendant Feigenbaum, and without any proof of his authorization, knowledge or consent, together with Government's Exhibit 28, 29, 30, 31, 32 and 33, introduced under such testimony.

The Court: The motion will be denied and exceptions noted for all defendants. [115]

XIX

That the said District Court erred in denying the motion of counsel for the defendant Feigenbaum to strike out the testimony of Walter Vogel and U. S. Exhibits 45 and 46 upon the grounds theretofore urged to the admission of such testimony and upon the further ground that the said testimony related

to an extrajudicial act and declaration of a co-conspirator said and done out of the presence of the defendant and without any proof of his authorization, knowledge, or consent thereto, to which ruling of the Court counsel for the defendant Feigenbaum duly excepted.

XX.

That the said District Court erred in denying the motion of counsel for the said defendant Feigenbaum to strike out the testimony of the witness Francis Duffy and Government's Exhibits 47, 48 and 49 upon the grounds theretofore urged for striking out the testimony and exhibits given under the testimony of Walter Vogel; to which ruling of the court counsel for the defendant Feigenbaum duly excepted.

XXI.

That the said District Court erred in denying the motion of counsel for the defendant Feigenbaum to instruct and direct the jury to find and return a verdict finding the defendant Feigenbaum not guilty, upon each of the following grounds, to-wit:

“1. That the evidence introduced by the Government is insufficient to support either a verdict or a judgment of guilty as to the defendant Feigenbaum.

2. That the offense sought to be charged in the indictment has not been proved by the Government;

3. That the evidence adduced fails and is [116] insufficient to prove the alleged conspiracy set forth in the indictment;

4. That the evidence adduced fails and is insufficient to prove that the defendant Feigenbaum was a member of identified with the conspiracy sought to be changed in the indictment.

5. That the evidence adduced by the Government does not exclude every other hypothesis except that of guilt, so far as the defendant Feigenbaum is concerned, and that such evidence is as consistent with his innocence as it is with his guilt.

6. That the only evidence tending to establish the conspiracy charged and Feigenbaum's connection therewith consists of extrajudicial acts and declarations of alleged co-conspirators, said acts and declarations of alleged co-conspirators having been done and made out of the presence and without the knowledge, authorization or consent of the defendant Feigenbaum."

to which ruling of the Court counsel for the defendant Feigenbaum duly excepted.

XXII.

The Court agreed in instructing the jury as follows:

"In every crime, there must exist a union or joint operation of act and intent and, on conviction both elements must be proved to a moral certainty and beyond a reasonable doubt. Such intent is merely the purpose or willingness to commit such an act; it does not require any knowledge that such act is a violation of the law. However, a person is presumed to intend to do all that which he voluntarily and wil-

fully does in fact do, and must also be presumed to intend all the natural, probable and usual consequences of all his own acts." [117]

The defendant Feigenbaum objected and noted an exception to the foregoing portion of the charge on the ground "that the crime of conspiracy involves a specific intent, and the presumption of intention as embodied in the court's instruction does not apply."

XXIII.

The Court erred in instructing the jury as follows:

"In the course of a trial, as in this case, which has run a number of days, and several hundred pages of transcript, as I understand, you may find some discrepancies or inconsistencies in the testimony of different witnesses. If such discrepancies or inconsistencies are not material and they do not affect the true issues of this case, and if they do not reasonably bear upon the guilt or innocence of the defendants, or any of them, do not waste your time in considering them."

The defendant Feigenbaum objected and noted an exception to the foregoing portion of the court's charge upon the ground that "the jury have a right to consider even inconsequential inconsistencies in determining the credibility of a witness."

XXIV.

That the said District Court erred in giving the following instruction to the jury:

"To constitute a conspiracy, it is not necessary

that two or more persons should enter into an express agreement for the unlawful venture or scheme, or that they should directly state between themselves or otherwise what the unlawful plan or scheme is to be, or the details thereof, or the means by which the unlawful combination [118] is to be made effective. It is sufficient if two or more persons, in any manner, positively or tacitly come to a mutual understanding to accomplish an unlawful design. In other words, when an unlawful end is sought to be effected and two or more persons, actuated by the common purpose of accomplishing that end work together in any way, in furtherance of the unlawful scheme, every one of such persons becomes a member of the conspiracy. The success or failure of the conspiracy is immaterial but before a defendant may be found guilty of the charge, it must appear beyond a reasonable doubt that a conspiracy was formed, as alleged in the indictment, and that the defendant was an active party thereto."

to which instruction counsel for the defendant Feigenbaum duly excepted.

XXV.

That the said District Court erred in refusing to give to the jury defendant Feigenbaum's requested instruction number 3, which was, and is, in words and figures following, to-wit:

"The indictment in this case charges the defendant Feigenbaum with having conspired with Louis Abel, Lawrence B. Goldsmith, Samuel S. Weiss and Harry Blumenthal, to unlawfully sell, at wholesale,

certain Old Mister Boston Rocking Chair Whiskey in excess of and higher than the maximum price established by law. If you find from the evidence that the defendant Feigenbaum merely purchased or agreed to purchase certain cases of Old Mister Boston Rocking Chair Whiskey from any other defendant in this case or that the defendant [119] Feigenbaum merely acted as the servant or agent or for or on behalf of one L. H. Taylor and/or one R. C. Humes for the purpose of purchasing for them certain Old Mister Boston Rocking Chair Whiskey from one or more of the other defendants in this case, and if you further find that the said defendant Feigenbaum was not acting as the servant, agent or employee of any other defendant named in this case, for the purpose of selling said whiskey, then you must return a verdict herein finding the defendant not guilty."

to which refusal of the Court, counsel for the defendant Feigenbaum duly excepted.

XXVI.

That the said District Court erred in refusing to give to the jury defendant Feigenbaum's requested instruction No. 4, which was and is, in the words and figures following, to-wit:

"Before you can find any defendant guilty in this case, it is necessary that the prosecution establish to a moral certainty and beyond a reasonable doubt that the conspiracy set forth in the indictment existed and that any such defendant was a member of that certain conspiracy. The conspiracy relied on by

the Government in this case is one wherein the defendant Lawrence G. Goldsmith, doing business as the Franciscan Distributing Company, was the owner and seller of the Old Mister Boston Rocking Chair Whiskey described in the indictment and that the defendants in case did conspire with each other to sell the particular Old Mr. Boston Rocking Chair Whiskey that was acquired and [120] owned by the defendant Lawrence B. Goldsmith. If you find that the defendant Feigenbaum in this case may have agreed with some person other than the defendants in this case to sell to such person cases of Old Mister Boston Rocking Chair Whiskey and that the said Feigenbaum, in order to make said sale to said third person, did buy from one of the defendants in this case, cases of such whiskey, and you do not find anything more on behalf of the defendant Feigenbaum, you must return a verdict herein finding the defendant Feigenbaum not guilty for the reason that he never became a member of the conspiracy charged in the indictment relief on by the Government, even though you should find that the sale of such whiskey by Feigenbaum to such third person was in excess of the maximum price established by law for such sale."

to which refusal, of the Court, counsel for the defendant Feigenbaum duly excepted.

XXVII.

That the said District Court erred in refusing to give to the jury defendant Feigenbaum's requested

instruction No. 5, which was and is, in the words and figures following, to-wit:

"If you find from the evidence in this case that the acts and conduct of the defendant Albert Feigenbaum amounted to no more than an action on his part to purchase, either for himself or for some other person, Old Mister Boston Rocking Chair Whiskey, and that he did so purchase said whiskey, then you must find that the defendant Feigenbaum was not a member of the conspiracy set forth and charged in the indictment and you must [121] return a verdict herein finding the defendant Feigenbaum not guilty."

to which refusal of the Court, counsel for the defendant Feigenbaum duly excepted.

XXVIII.

That the said District Court erred in refusing to give to the jury defendant Feigenbaum's requested instruction No. 6, which was, and is, in words and figures following, to-wit:

"I instruct you that where a transaction consists on the one hand of the selling of an article, that is either prohibited by law or that is being sold in a manner that violates the law, and on the other hand by the purchase of such article by another person, then, under such circumstances, the buyer and the seller are not guilty of a conspiracy to sell such article. Therefore, if you find from the facts in this case that the transaction involved amounted on the one hand to some of the defendants, other

than Feigenbaum agreeing to sell the whiskey described in the indictment at a price prohibited by law, and on the other hand that the defendant Feigenbaum merely agreed to purchase for himself or for some other person, some of the said whiskey at said price, then you must find that the defendant Feigenbaum was not a member of any conspiracy that had for its object the selling of said whiskey, he being merely a purchaser or agent for the purchaser thereof. Under such circumstances you must return a verdict finding the defendant Feigenbaum not guilty." [122]

to which refusal of the Court, counsel for the defendant Feigenbaum duly Excepted.

XXIX.

That the said District Court erred in refusing to give to the jury defendant Feigenbaum's requested instruction No. 7 which was, and is, in words and figures following, to-wit:

"If you find from the evidence in this case that the defendant Feigenbaum did agree with a man named H. L. Taylor and/or with a man named R. C. Humes to sell to either or both of such persons certain Old Mister Boston Rocking Chair Whiskey at a price in excess of the maximum price established by law, but if you also find that the defendant Feigenbaum had not agreed with any other defendant in this case to sell any Old Mister Boston Rocking Chair Whiskey at a price above that provided by law, then you must return a verdict herein finding the defendant Feigenbaum not guilty on

the ground that he was not a member of the conspiracy charged in the indictment."

to which refusal of the Court, counsel for the defendant Feigenbaum duly Excepted.

XXX.

That the said District Court erred in refusing to give to the jury defendant Feigenbaum's requested instruction No. 8, which was, and is, in words and figures following, to-wit:

"I instruct you that the defendant Albert Feigenbaum is not on trial for conspiring or agreeing with H. L. Taylor or R. C. Humes to sell to said R. L. Taylor or R. C. Humes, Old Mr. Boston Rocking Chair Whiskey at a price in excess of the maximum price established by law. [123] If the evidence in this case only establishes or tends to establish that the defendant Feigenbaum only conspired and agreed with H. L. Taylor and R. C. Humes to sell said whiskey, at a price in excess of the maximum price established by law, you must return a verdict finding the defendant Feigenbaum not guilty as that would not be the conspiracy charged in the indictment and for which the defendant Feigenbaum is on trial."

to which refusal of the Court, counsel for the defendant Feigenbaum duly Excepted.

XXXI.

That the said District Court erred in refusing to give to the jury defendant Feigenbaum's requested instruction No. 20, which was, and is, in words following, to-wit:

"Where an act may be attributed to a criminal or an innocent cause, it is the duty of the jury to attribute the act to the innocent cause rather than to the criminal one. A crime is never presumed where the conditions may be explained upon an innocent hypothesis. It is the duty of the jury, to reconcile, if possible, all circumstances shown in evidence with the innocence of each defendant and to account for all facts, if possible, upon the hypothesis that the defendant is not guilty."

to which refusal of the Court, counsel for the defendant Feigenbaum duly Excepted.

XXXII.

That the said District Court erred in refusing to give to the jury defendant Feigenbaum's requested instruction No. 22 [124] which was, and is, in words following, to-wit:

"When independent facts and circumstances are relied upon to establish, by circumstantial evidence, the guilt of a defendant, each material, independent fact or circumstance in the chain of facts relied upon must each be established to a moral certainty and beyond a reasonable doubt. If in the chain of facts or circumstantial evidence any one or more of the material facts in such chain are not established to a moral certainty and beyond a reasonable doubt, the entire proof fails and a verdict of not guilty must be returned."

to which refusal of the court, Counsel for the defendant Feigenbaum duly Excepted.

XXXIII.

That the said District Court erred in refusing to give to the jury defendant Feigenbaum's requested instruction No. 26, which was, and is, in words following, to-wit:

"The evidence in this case on which the prosecution relies is circumstantial evidence. Where the evidence relied on for a conviction is circumstantial such evidence must be not only consistent with the hypothesis of guilt, but inconsistent with any other rational hypothesis. Therefore, if you find in this case that the evidence leads to two opposing and rational conclusions, one that the defendant Feigenbaum is guilty and the other that the defendant is not guilty, it is your duty to adopt the conclusion that the defendant is not guilty and return a verdict finding the defendant Feigenbaum not guilty." [125]

to which refusal of the court, counsel for the defendant Feigenbaum duly Excepted.

XXXIV.

That the said District Court erred in refusing to give to the jury defendant Feigenbaum's requested instruction No. 27, which was, and is, in words following, to-wit:

In order for you to find the defendant Albert Feigenbaum guilty of the crime of conspiracy as charged in the indictment it is necessary that you find, among other things, to a moral certainty and beyond a reasonable doubt that a conspiracy existed between at least two persons to do the things

set forth in the indictment and that Albert Feigenbaum was a member of such conspiracy. In determining whether such conspiracy existed and that Feigenbaum was a member of such conspiracy you cannot take into consideration and must disregard all testimony and evidence relating to the acts and declarations of any alleged conspirator, other than the defendant Feigenbaum, said or done out of the presence of the defendant Feigenbaum. The existence of the conspiracy charged and Feigenbaum's connection therewith must be established by evidence independently of the acts and declarations of any alleged co-conspirator of Feigenbaum's said or done out of the presence of the defendant Feigenbaum."

to which refusal of the court, counsel for the defendant Feigenbaum duly Excepted.

XXXV.

That the said District Court erred in refusing to give to the jury defendant Feigenbaum's requested instruction No. 28, which was, and is, in words following, to-wit: [126]

"In determining whether a conspiracy existed, as charged in the indictment, and that the defendant Feigenbaum was a member of such conspiracy, I instruct you that you cannot consider testimony of the acts or declarations of any other person, charged in the indictment with being a co-conspirator with Feigenbaum, where such acts or declarations were done or made out of the presence of defendant Feigenbaum."

to which refusal of the Court, counsel for the defendant Feigenbaum duly Excepted.

XXXVI.

That the said District Court erred in refusing to give to the jury defendant Feigenbaum's requested instruction No. 29 which was, and is, in words following, to-wit:

"In determining whether the conspiracy charged in the indictment existed and that Albert Feigenbaum was a member of such conspiracy you must reject and disregard all evidence and testimony in the case relating to anything said or done, out of the presence of defendant Feigenbaum, by the defendants Goldsmith, Blumenthal, Weiss and Abel."

to which refusal of the court, counsel for the defendant Feigenbaum duly Excepted.

XXXVII.

That the indictment in the cause entitled as above, was, and is, null and void, and the verdict, judgment, and sentence entered thereon were likewise, severally, null and void, for the reason that the Maximum Price Regulations named and [127] mentioned therein, were and are, severally, void for uncertainty, for the reason that the same are couched in language so vague, uncertain, and indefinite, that it was, and is, impossible for a person of common understanding to ascertain what act or acts might lawfully be done thereunder, and what act or acts are prohibited thereby; and that by reason thereof, the conviction of this defendant, upon

said indictment which charges a conspiracy to violate each of the said regulations, was, is, and constitutes, a deprivation of liberty without due process of law within the meaning of the Fifth Amendment to the Constitution of the United States.

Wherefore, this defendant and appellant Albert Feigenbaum prays that the said judgment of the said District Court be reversed, and that he, the said defendant, go hence sine die.

Dated: July 20, 1945.

(Signed): LEO R. FRIEDMAN
Attorney for Defendant
Albert Feigenbaum.

(Acknowledgment of Service.)

[Endorsed]: Filed July 20, 1945. [128]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS FOR
APPELLANT ABEL

Lewis Abel, one of the appellants herein, complains of the judgment of the above entitled matter, of the order overruling his demurrer to the indictment, of the order denying his motion for a new trial and of the order denying his motion in arrest of judgment and of the rulings of the District Judge on the trial of this case and each of them, and avers that in the proceedings in said cause and in the above mentioned orders, rulings and judg-

ment manifest error has occurred to the prejudice of said appellant of which he makes the following

ASSIGNMENTS OF ERROR

which he asserts and intends to urge and rely upon in the Circuit Court of Appeals for the Ninth Circuit upon his appeal herein.

1. The District Court erred in overruling this appellant's demurrer to the indictment.

2. The District Court erred in overruling this appellant's motion for a new trial.

3. The District Court erred in overruling this appellant's motion in arrest of judgment.

4. The District Court erred in holding that the indictment states a public offense against this appellant.

The District Court erred in each of the following rulings on the evidence:

5. In admitting in evidence as against this appellant, United States Exhibit 2 for identification, a document entitled "Wholesale Liquor Dealers' Monthly Report Summary of Forms 52A and 52B" (a document showing the purchases of the Francisco Distributing Company during the month of December, 1943) to which defendant Abel objected on the ground that said document was incompetent, irrelevant and immaterial and that no proper foundation had been laid therefore; that it had nothing to do with the [130] issues in the case and that any purchases of any commodity made by the de-

defendant Goldsmith or The Francisco Distributing Company were not in issue; upon the further ground that said document was hearsay as to this appellant and to the overruling to which objections this appellant excepted.

6. In admitting in evidence Government's Exhibit No. 3 for identification entitled "Wholesale Liquor Dealers' Monthly Report Summary of Forms 52A and 52B" bearing the date of January, 1944, to which appellant Abel made the same objections as to United States Exhibit 2 and to the overruling of which he excepted.

7. In admitting United States Exhibits 4, 5, and 6, or any of said three exhibits, which consisted of the 52A and 52B records of the Francisco Distributing Company which had been filed through the months March, 1942 to the month of December, 1943. These three exhibits were admitted in evidence for the limited purpose of showing that there were no sales of the particular whiskey mentioned in the indictment covered by the said reports to the introduction of which this appellant objected upon the ground that the same were incompetent, irrelevant and immaterial and no part of the res gestae and that there was no foundation laid for the introduction thereof and to the overruling of which objections he excepted.

8. In refusing to strike out the testimony of the defendant Robert Otis Grubbs on the ground that the same was incompetent, irrelevant and immaterial and not binding on this appellant. Said

testimony was first, that said witness was chief claims clerk of the Santa Fe Railroad in San Francisco and had been working for said railroad since 1902; continuously since 1911; he produced a freight bill marked United States Exhibit 7 for identification; a bill of lading marked United States Exhibit 8 for identification, which freight bills are kept as a permanent office record pursuant to the conduct of the Santa Fe's business and [131] which was received in evidence. Both were for whiskey "Old Penn Midland Imp. Corp. Ntfy Francisco Distributing Company". Exception.

9. In refusing to strike out the following testimony of the witness Fred A. Sander, "that portion was delivered from the car under orders from the Francisco Distributing Company. It didn't go into the warehouse. 1426 cases were delivered ex car. By 'ex car' I mean delivered right from the car on arrival. 1426 cases were delivered from the car on arrival." Counsel for this appellant moved that the last statement of the witness be stricken out on the ground that it was incompetent, irrelevant and immaterial hearsay and that there was no foundation laid for it and excepted to the denial of said motion. In overruling the following objection, "Mr. Colvin: Q. Mr. Sander, who, if any one, instructed you regarding the unloading of the two freight cars whose numbers appear in your records?", objected to as incompetent, irrelevant and immaterial and assuming something not in evidence. Overruled; exception.

10. In overruling the objection to the following question of the same witness: "Q. What was the content of this conversation relating to these shipments?" Objected to as incompetent, irrelevant and immaterial hearsay, no part of the res gestae not within the charge of conspiracy so far as this appellant is concerned and asked that if the conversation was related, the jury be instructed to disregard the statement as to this appellant. Objection overruled; request for instruction denied; exception. Objected to as hearsay; objection overruled; exception.

11. In admitting in evidence United States Exhibit 9 showing the receipt of 650 cases of whiskey from Pennsylvania car P.R.R. 568500. Objected to as incompetent, irrelevant and immaterial. Overruled; exception.

12. In admitting in evidence United States Exhibit No. 10 consisting of car instructions "Francisco Distributing Company" to deliver various lots of cased distilled spirits called "Old [132] Mr. Boston Rocking Chair" to respective people, customers of theirs.

Objected to as incompetent, irrelevant and immaterial and calling for the opinion and conclusion of the witness and hearsay. Exception.

13. In admitting United States Exhibit 14 consisting of an order for the entire operation of the distribution of the contents of that car.

Objected to as incompetent, irrelevant and self-serving. Overruled; exception.

14. In making the following ruling:

The Witness (Sander): I sent a bill for the services which my company rendered in this matter.

Q. To whom did you send the bill?

Objected to as self-serving. Overruled; exception.

15. In making the following ruling:

Q. Did Mr. Goldsmith visit the bank with reference to this transaction?

Objected to as leading and suggestive. Overruled; exception.

16. In giving the following instruction to the jury during the examination of the witness Joseph N. Nathanson:

The Court: I will instruct the jury at the present time that pursuant to the authority given to me by statute, the Price Administrator on May 22, 1943, promulgated an Order No. 5 in which he fixed the maximum prices for all sales by Ben Burke Inc., Foster & Company and American Distilling Company as follows: That on or after May 24, 1943 Ben Burke Inc., Boston, Massachusetts; Foster & Company, New York City and American Distilling Company, Beacon, Illinois, may sell and deliver to any person and any person may buy and receive from those sellers "Old Mr. Boston Rocking Chair Whiskey", a blend of straight burbon whiskeys, 80.6 [133] proof, aged, as above, at the following prices: \$19.24—that is not in issue; that is another kind of whiskey?

Mr. Colvin: That is for pints.

The Court: \$15.37 plus \$3.87 being the amount of the increased excise federal tax of November 1942, applicable thereto, or a total of \$19.24 for twelve bottles, each bottle containing one-fifth gallon of said whiskey. Now, do you wish to take exception of that?

Objection to what the court told the jury and request that the jury be instructed to disregard anything just read from the Federal Register or advised about upon the following grounds:

First: That the purported order is only an order that regulates processors of these particular distilled products; it has nothing to do with wholesalers; it has nothing to do with people who buy from wholesalers or jobbers—that is the portion you have instructed the jury about—and therefore that this portion of the order is not binding upon this appellant who is neither a processor nor a seller of distilled spirits.

Secondly: Upon the ground that the order on its face is in violation and in excess of the power conferred by the Emergency Price Control Act for these reasons:

That under the Emergency Price Control Act the Administrator has the power by general order and by general order only, to fix the prices of any commodity within a particular area or region and that he has not the power and never was given the power by Congress to fix different prices for different people for the manufacture of the same

kind of article and this is a special order applicable only to certain people.

Further objected to that this testimony and this regulation for this purpose is incompetent, irrelevant and immaterial. We are not here charged with any dealings with Burke or the American Distillery or anyone else; and as involving an [134] an unlawful delegation of power.

Objections overruled; exception.

17. In the following ruling:

(The Witness [Nathanson] Continuing): I am familiar with Government's Exhibit No. 8 and with the date thereon.

Q. Mr. Nathanson, I call your attention to Section 24 of the Alcoholic Beverage Control Act, said section being published at page 2017 of the California Code General Laws and Constitution 1941 Supplement of Deering, published by Bancroft & Whitney Company and ask you if you are familiar with that section?

Objected to as incompetent, irrelevant and immaterial.

Overruled; exception.

18. In the following rulings during the testimony of Norman Reinburg:

Q. At the time you gave the check to Mr. Abel, what was said with regard to the payment of cash.

Objected to as leading and suggestive.

Overruled; exception.

The Witness: That I pay the balance in cash upon receipt of the bill.

Mr. Colvin: Q. Did Mr. Abel say that was the selling price, \$2,450.00? A. Yes.

Objection to the question as leading.

Overruled; exception.

19. In the following ruling on the testimony of the same witness.

Q. Were 100 cases of "Old Mr. Boston Rocking Chair Whiskey" delivered to you?

Objected to as incompetent, irrelevant and immaterial and calling for the opinion and conclusion of the witness.

Overruled; exception. [135]

20. In overruling objection to the following testimony:

During this period of time I traveled to San Francisco with Mr. Abel on two occasions. The first occasion was about the 6th or 7th of December. I took Mr. Abel with me in my car. I took him in the downtown section here about three or four blocks off Market about 3rd or 4th. The place was a jewelry store, pawn shop, sports goods. I left Mr. Abel off at this sports goods shop. I had a conversation that I would pick him up there in one-half hour. I drove down there on the date of the first trip at Mr. Abel's direction. He did not say to drive to this particular sports goods shop; he said "up that street and down that street and stop here".

Objection overruled; exception,

21. In the following ruling during the testimony of witness John Giometti:

Q. At that time did you give any cash to Norman Reinburg?

Objected to as calling for evidence not binding on this appellant. Overruled; exception.

The Witness: I gave him the balance of the \$65.00 a case.

(The Court:) \$2,025.00.

22. In the following ruling:

(Same witness) Mr. Colvin: Q. What was that conversation with Mr. Abel regarding your purchase of this whiskey?

Objected to as incompetent, irrelevant and immaterial; not within the issues of the conspiracy charged in the indictment for the reason that anything that defendant Abel may have said if it was subsequent to the conclusion of the transaction, would not be within the issues and would not be competent or pertinent after the transaction had been concluded.

Overruled; exception.

23. In the following ruling during the testimony of [136] Victor Figone.

During the month of December, 1943 I made a purchase of "Old Mr. Boston Rocking Chair Whiskey". I purchased the whiskey from some gentlemen in the Francisco Distributing.

Question objected to on the ground that founda-

tion therefore had not been laid and not binding on this appellant and hearsay.

Overruled; exception.

24. Motion to strike answer on the ground that it was not connected with this appellant.

Overruled; exception.

25. In the following ruling during the testimony of Milton Avila.

During the months of December, 1943 or January, 1944 I purchased 75 cases of "Old Mr. Boston Rocking Chair Whiskey". All my dealings were with Mr. Figone. I paid \$60.00 a case. That payment was some odd \$1800.00 by check, the rest of it cash. I delivered that check and cash to Mr. Figone. Subsequently I received the whiskey. A big dual truck came on January 3 and Victor helped me unload mine and I helped him unload his. The invoice of that whiskey came by mail within the following week some time; I don't remember exactly when, billed "Francisco Distributing Company". The check had been made payable to Francisco Distributing Company. I never went over to Francisco Company.

Motion that this testimony be excluded as not binding on this appellant; hearsay; incompetent, irrelevant and immaterial.

Overruled; exception.

26. In the following ruling during the testimony of James Cermusco.

Mr. Colvin: Q. At whose direction did you stop at that place on 3rd Street? [137] -

Objected to as incompetent, irrelevant and immaterial.

Overruled; exception.

27. The following ruling during the testimony of same witness:

I had a conversation the time I stopped on 3rd Street that day as to where the whiskey was and he said it was in the San Francisco Warehouse.

Q. And what did you say to that?

Objected to as hearsay.

Overruled; exception.

28. In the following ruling during the testimony of Henry L. Taylor.

The Witness: (continuing) I had a conversation with Mr. Feigenbaum. That conversation took place at the sports goods store which I have mentioned. Besides Mr. Feigenbaum and myself, my wife and Mr. Humes were present and there were two other parties there.

Q. What was that conversation regarding the purchase of whiskey?

Objected to as incompetent, irrelevant and immaterial, the corpus delicti of the charge in this indictment has not been laid and until the corpus delicti is established by any acts, declarations or statements of the defendant, an alleged co-conspirator are inadmissible.

Overruled; exception.

29. The following ruling:

(Same witness) I had a conversation with the man to whom I gave the check which took place in the street in front of this bar. Besides myself and little Joe, Mr. Humes and this man Tucker were present.

Q. What was the conversation?

Objected to on the ground that the conversation was not [138] binding upon this appellant because it was a conversation occurring out of his presence.

Overruled; exception.

30. In the following:

(Same witness): Q. What conversation did you have with Mr. Feigenbaum on that date regarding the whiskey..

Objected to as incompetent, irrelevant and immaterial; proper foundation not laid. We have no proof of the corpus delicti or fact, act, statement or declaration of an alleged co-conspirator * * *

Overruled; exception.

31. In the following during the testimony of Ruth Taylor.

I did not witness the payment in cash of any money to Mr. Feigenbaum on that occasion . . . there was a discussion about writing the check. . .

Q. What was that discussion.

Objected to as incompetent, irrelevant and immaterial and as calling for acts, declarations and

transactions participated in and performed by defendant Feigenbaum when the substance of the offense charged had not yet been established.

Overruled; exception.

32. In the following from the testimony of Raymond C. Hughes.

Q. What was the conversation you had with Mr. Feigenbaum?

Objected to as calling for the act or declaration on the part of the co-conspirator in the case and that there had been no proof of the corpus delicti.

Overruled; exception.

33. The following in the testimony of Walter J. Vogel.

Q. Did you give any cash to this man in addition to [139] this check?

Objected to as being without foundation.

Overruled; exception.

34. The following in testimony of Francis Duffy.

The Witness: (continuing) I gave this check (Government's Exhibit 48 for identification) to that man. The date of my first conversation with the man was about the 3rd or 4th of December, and took place at my place of business. I was the only one present. My father was sick. I imagine the time of the conversation was in the early part of the afternoon, around 1:30.

Again objected to as not binding upon this appellant.

Overruled; exception.

35. Following in testimony of Angelo Lombardi. Then said "the whiskey will be up there in a few days". Mr. Minkler said that. I went back to Santa Rosa with him.

Q. What happened back at Santa Rosa regarding this transaction?

Objected to as hearsay and not binding on this appellant.

The Witness: (Continuing) We just left there and Minkler went back to his own place of business and I went back to mine, and about two or three days after he called up and said that the whiskey was on its way.

Objection to this evidence and to anything that happened between Minkler and this witness.

Objections overruled; exception.

36. The following in testimony of Walter H. Travis.

Q. You say the check was written before you arrived at the sportorium? Will you clarify that testimony please.

Objected to as cross-examination of own witness. There is nothing to clarify.

Objection overruled; exception. [140]

37. In the following, same witness.

(Cross-examination) "Q. But the truth is you have never been indicted in this conspiracy that you were also in. A. No."

Mr. Colvin: I ask that that be stricken.

Mr. Colvin: It is an assumption of counsel that the witness was, in the conspiracy.

The court granted the motion to strike the testimony.

Exception.

38. In granting the following motion of the Government at the close of all the evidence.

Mr. Colvin: Your Honor, for the sake of the record, I take it that the record will show that the Government does offer all evidence which has been admitted against any defendant as against all the defendants, and that further, the Government now makes an offer of all documents marked for identification to be admitted against all of the defendants.

Mr. Colvin: I further move that the documents 1-14 inclusive, which have been admitted against individual defendants, be admitted as against individual defendants, be admitted as against all.

Mr. Fredman: I understand that the motion concretely of the Government at this time is that all testimony and all documents, irrespective of how they came into the record up to this time, be now admitted against all defendants.

Mr. Colvin: That is the motion.

Mr. Friedman: First we come to the one I discussed last Friday, the testimony of Edward Hark-

ins. We object—I say “we”—I mean the defendant Feigenbaum—We object to the admission of this testimony, which was admitted solely against the defendant Weiss, on the ground that it calls for a conversaton had by Harkins with Goldsmith on two occasions, and testimony had by Harkins with Weiss and Goldsmith on one occasion, as I recall it, [141] in which it is alleged that the defendants Goldsmith and Weiss made certain statements and declarations, all of which were as to past events.

We object to the admission in evidence against the defendant Feigenbaum of the testimony of Sander as to any conversations he had with Weiss, upon two grounds: First, that part of that conversation and alleged utterances by Weiss were narrative of past events, and upon the second ground that they are declarations of an alleged co-conspirator made out of the presence of Feigenbaum, that they are hearsay, that the corpus delicti of the conspiracy has not been established, and that there is no evidence to show that Feigenbaum was a member of that conspiracy, and therefore the statements, acts and declarations of a co-conspirator made out of his presence cannot be admitted in evidence against him for any purpose.

The defendant Feigenbaum objects to the admission in evidence against him of any of the testimony given by the witness Giometti on the ground that it is hearsay, that it calls for acts and declarations of third parties out of the presence of the defendant Feigenbaum, and even the acts and declarations of people that Feigenbaum never even knew or heard

of, given at another time, and upon the further ground that the corpus delicti has not been established, and that therefore these matters cannot be competent evidence against Feigenbaum. And during the course of Mr. Giometti's testimony there was introduced for identification Government's Exhibit No. 24, which was an invoice, and Government's Exhibit No. 25, which, I think, was a freight bill, or waybill, of some kind or other. And we object to the admission of Government's Exhibits 24 and 25 in evidence against the defendant Feigenbaum, on the ground they are hearsay, proof of the conspiracy has not been established, that the connection of the defendant Feigenbaum with such conspiracy has not been [142] established at all.

First having objected in general to all the testimony of Giometti, we now object to this specific portion of Giometti's testimony going into evidence against the defendant here upon the ground that it is incompetent, irrelevant, and immaterial, that the corpus delicti of the offense has not been established, and it calls for acts and declarations between third persons made out of the presence of the defendant Feigenbaum, and there is no proof he was a member of any conspiracy, or that he authorized, had knowledge of, or ratified any such conversation or acts on the part of Abel.

So far as the testimony of Mr. Reinburg is concerned, we object to the admission in evidence against the defendant Feigenbaum of the testimony given by Mr. Reinburg upon the ground it is hearsay, upon the ground it calls for acts, transactions

and events occurring out of the presence of the defendant Feigenbaum, that the corpus delicti of the offense has not been established, and there has been no evidence tending to establish the connection of Feigenbaum with any conspiracy charged or contained in the indictment filed herein, and that the testimony of Mr. Reinburg, so far as any acts, transactions or events he had with the defendant Abel are concerned, that the acts and statements and declarations of the defendant Abel are not binding upon the defendant Feigenbaum for the reasons I have stated.

During the examination of Mr. Reinburg there was offered for identification Government's Exhibits 22, 23, 34, and 35, 22 and 23 being bills and invoices, 34 and 35 being checks, and we object to the admission of each of these exhibits in evidence as against the defendant Feigenbaum for each and all of the reasons that we have urged against the admission of the testimony of the defendant Reinburg and the testimony of the [143] defendant Giometti, and upon the further ground that the proper foundation for none of these four documents has been established, and that there was no proof, first, as to the bills and invoices, that they were issued by the Francisco Distributing Company and, secondly, there was no proof that the checks written and given by Giometti and by Reinburg were ever received by the Francisco Distributing Company, or cashed by them. Again I confine, of course, the evidence as it appears against the defendant Feigenbaum.

I object to the admission in evidence against Feigenbaum of any testimony given by the witness Figone on all the grounds I have heretofore urged as to the admission of some of the testimony, that it is hearsay, that the corpus delicti of the charge has not been established; there is no independent evidence to show that there was a conspiracy, or that Feigenbaum was a member thereof, other than testimony as to the acts and declarations of alleged co-conspirators; that the testimony as to all those transactions and events occurring out of the presence of the defendant Feigenbaum, they are not binding on him, there being no proof he authorized, sanctioned, or even had knowledge of such transactions.

The Court: Mr. Friedman, it is your point, as I get it—and I think it is the serious point in this matter, going right to the nub of this matter, that here are several transactions disclosed in the evidence by which these men paid over the ceiling price for liquor, and there isn't any doubt that there is a prima facie showing as to the individual defendants participating in the transactions of that nature. But the point you make is the evidence fails to disclose any evidence of a concerted action on their part so as to make the substantive offense a conspiracy rather than the violation of a particular statute.

Mr. Friedman: That is correct.

I think this morning I objected to the Reinburg and Giometti testimony, to the Figone and the Avila testimony, as I recall it, and Exhibits Nos. 26 and

27, the check and invoice that were admitted on Figone's testimony. As to Figone, Avila, and those two exhibits, of course, Feigenbaum objects to their admission in evidence against him on all the grounds previously stated, and on the ground they are hearsay as to him; no foundation has been laid for the check or invoice establishing who actually received and deposited the check or who made the invoice; and that the corpus delicti has not been established, there being no proof that Feigenbaum was a member of any conspiracy, and there being no proof of any conspiracy, at all.

As to the witness James Cermusco, upon whose testimony there were marked for identification Exhibits 27, 28, 29, 30, 31, 32, and 33, I object to the introduction against the defendant Feigenbaum of Cermusco's testimony on the ground it is hearsay, the corpus delicti has not been established, it calls for acts, declarations and events by a third person out of the presence of Feigenbaum. It is not binding upon him, and I object to the admission in evidence of Exhibits 28 to 33, inclusive, upon the same grounds, and likewise upon the ground that no foundation has been laid for such checks, in that there was no proof as to who received or cashed them. There is no proof as to who issued the invoices.

Upon the same grounds I move to strike out the testimony of Vukota and Lewis, on the ground it is hearsay twice removed. These men, the testimony shows, only dealt with Cermusco. They never saw anybody named as a defendant in this case and, as

I recall it, anybody connected with the Francisco Company. Their acts, statements and declarations are hearsay as to [145] Feigenbaum, acts and declarations out of his presence, over which he had no control; the corpus delicti of the offense charged has not been established, and that there has been no independent proof identifying Feigenbaum with the conspiracy charged.

The next set of witnesses—and I can deal with them jointly—are Henry L. Taylor, Ruth Taylor, and Raymond C. Humes. This testimony was admitted as to Feigenbaum, and at this time I am going to move to strike it out on the following grounds, to wit, that such testimony of these three witnesses, all dealing with the same event, is entirely immaterial and incompetent, for the reason that the corpus delicti of the offense has not been established, and upon the further ground that all this showing was an independent, isolated transaction wherein Mr. Feigenbaum agreed to act as the agent for Mr. Taylor and Mr. Humes for the purchase for these people of 200 cases of whiskey, and that that was the agreement between the parties, and there was no agreement between Feigenbaum and either Taylor or Humes, or both of them, that Feigenbaum was to sell to either of these parties any whiskey.

On like grounds I move to strike out U. S. Exhibit 34, the check for \$4,900, testified to as having been written by Mrs. Taylor and delivered to Feigenbaum, and United States Exhibit No. 35, the invoice that was involved in that transaction.

I object to the admission in evidence of the testimony of Walter G. Vogel, together with U. S. Exhibits 45 and 46, which were introduced and marked for identification upon his examination. You will recall that Vogel testified that some strange and unidentified man came into his place and offered to sell him whiskey at \$24.50 a case for the Distributing Company, demanding a brokerage for all over that amount. There is absolutely no evidence that this man Vogel knew anybody connected with the charge [146] in this indictment whatsoever, and Vogel's testimony relates to an incident clearly *res inter alios acta*, hearsay as to the defendant Feigenbaum, the proof of the *corpus delicti* of the offense has not been established, and it calls for acts and transactions out of the presence of Feigenbaum, without any evidence to show that he knew, sanctioned, approved or ratified or authorized such transaction, and that goes to the two exhibits 45 to 46, as well as to Vogel's testimony.

I likewise object to the introduction in evidence against Feigenbaum of the testimony of Francis Duffy, together with United States Exhibits 47, 48, and 49, consisting of two checks and an invoice that were marked for identification upon Duffy's examination. The testimony shows that Duffy, who operates a tavern—a man came in, whom he couldn't identify, as I recall it; that he bought from this man 100 cases of whiskey at \$24.50 and paid the man a premium of \$20 a case, gave him a check for \$2000, a check for \$2450. The invoice came in, the name of the payee on this check was left in blank,

filled in by the man after he went away. The testimony of Duffy is wholly incompetent, absolutely hearsay, *res inter alios acta*, calls for transactions and events out of the presence of the witness Feigenbaum, which he is not shown to have sanctioned, ratified or confirmed, authorized, or approved in any way; that the *corpus delicti* of the charge of the indictment has not been established, or any evidence to show that he was a member of any conspiracy.

I object to the introduction in evidence of the testimony of Angelo Lombardi, together with U. S. Exhibits 50 and 51, which consist of a check written by Lombardi to a man named Minkler, and an invoice. Lombardi testified that in Santa Rosa he bought 100 cases and gave some cash to Mr. Blumenthal for it. Minkler contacted him about the whiskey. He went to San Francisco and talked to some man there, and so forth. That later on, on the 20th of December, he [147] came to the Sportorium with Minkler. He went into a back room and paid Blumenthal some money. I will object to this testimony, the check, and the invoice, upon the grounds I have heretofore stated, that the matter is purely *res inter alios acta*, is not binding on the defendant Feigenbaum, calls for acts, transactions and events out of his presence, over which he has no control, and they are not binding on him; the *corpus delicti* has not been established, and in this case, as in the others, it calls for the acts and declarations of a **co-conspirator** made out of the presence of Mr. Feigenbaum, and it is inadmissible, as these other matters are inadmissible for any purpose until the *corpus*

delicti has been established by independent testimony. On the same grounds, I object to the introduction in evidence of the testimony given by Herman Fingerhut, together with exhibits 53, 54, 55, 56 and 57, introduced upon his examination. Fingerhut owned a cafe in Vallejo. He said on December 3rd and 4th he saw Blumenthal, bought 200 cases of whiskey at \$55; that later he and Mr. Travis went to the Sportorium and had another deal with Blumenthal.

I object to the testimony of this witness upon all the grounds I have heretofore stated. It calls for the declaration and conduct of an alleged co-conspirator, Blumenthal, out of the presence of the defendant Feigenbaum, and without any independent proof of the corpus delicti or of Feigenbaum's connection with the alleged conspiracy; upon the further ground it is hearsay, not binding on the defendant Feigenbaum; it constitutes acts that were done without his knowledge, consent, ratification or approval.

I object to the introduction in evidence of the testimony of Walter Travis, together with Government's Exhibits 58, 59 and 60, consisting of two invoices and a freight bill. The testimony of Walter Travis was the same as that of Fingerhut, except that in the first deal Fingerhut took 100 and Travis took 100, and in [148] the second, hundred, 75 were for Travis and 25 for Fingerhut.

I object to the introduction of this testimony and the three exhibits I have designated, upon all the grounds I have objected to the testimony of Finger-

hut and the checks and invoices involved in Fingerhut's testimony.

I object to the testimony as against the defendant Feigenbaum, of the testimony given by the witness A. P. Jones. Mr. Jones, as I recall, testified to certain Alcohol Tax Unit forms 52-A and 52-B, which were marked Government's Exhibit No. 2 and Government's Exhibit No. 3, and Government's Exhibits 4, 5, and 6. These forms were introduced for the purpose of showing the purchase or lack of purchase of certain whiskey by the Francisco Distributing Company during certain months. I object to those forms being in evidence against Feigenbaum, on the ground they are *res inter alios acta*. They constitute hearsay as to him. No proper foundation has been laid as to any of these forms, and there is no proof they were executed by any alleged conspirator in this case; that they are hearsay as to Feigenbaum, and that they cannot be considered for any purpose in determining his guilt or innocence.

I object to the introduction in evidence against Feigenbaum of the testimony given by the witness Robert Grubbs. Robert Grubbs was connected in some way with the Santa Fe Railway, and he testified to Government's Exhibits 7 and 8, and I object to the introduction of such exhibits in evidence, consisting of two freight bills for two carloads of whiskey, on the ground the matter is purely hearsay as to the defendant Feigenbaum. They are acts, transactions and events out of his knowledge, presence or hearing. It is not shown he knew of, ratified, confirmed, authorized or approved, and these

matters are wholly incompetent to be considered in determining the guilt or innocence of the defendant Feigenbaum. [149]

I likewise move to strike out the testimony of Fred A. Sander, or, rather, I object to the admission of the testimony of Fred A. Sander in evidence against the defendant Feigenbaum, together with United States Exhibits 9, 10, 11 and 12, which were introduced and marked upon the examination of this witness, upon the ground that the testimony of Mr. Sander, who was connected with the San Francisco Warehouse and executed two warehouse receipts, and testified as to certain instructions as to the disposal of the contents of the cars which he said were represented by those receipts supposed to have been given to him by the defendant Weiss. I object to all the testimony and all these exhibits I have enumerated, upon the grounds that as to the defendant Feigenbaum it is wholly incompetent, irrelevant, and immaterial and hearsay as to him, not binding upon him; that there has been no proof of the corpus delicti or the defendant's connection with any conspiracy, or the conspiracy set forth in the indictment. These matters are merely *res inter alios acta*, and I object to their admission. Additionally, I object to the admission of that portion of Mr. Sander's testimony which has to do with conversations he said he had with the defendant Weiss on December 15th and on December 17th, relative to delivery orders, invoices, and what was to be done with these two cars of whisky, upon the grounds that that evidence constitutes the acts, declarations

and statements of an alleged co-conspirator, made out of the presence of the defendant Feigenbaum, and there being no proof of the corpus delicti, the same as that binding on the defendant Feigenbaum.

I likewise object to the introduction in evidence against the defendant Feigenbaum of United States Exhibits 13 and 14, which have to do with certain invoices of a carload of whisky out of a B&O Railroad car, upon all the grounds I have objected to the other portions of the admission of the other railway [150] receipts and instructions, as testified to by Sander under the prior exhibits; and additionally, I object to the admission against Feigenbaum of the testimony of the witness Sander relative to a conversation he said that he had with Weiss on January 3, 1944, in which the invoices were received by Weiss, and in which Weiss told him to do something about the delivery, on the ground that the testimony as to the acts and declarations of an alleged co-conspirator is inadmissible and not binding upon Feigenbaum, and there has been no independent proof of the corpus delicti of the offense, or Feigenbaum's connection with any alleged conspiracy.

I object to the admission in evidence against the defendant Feigenbaum of the testimony of the witness Frank Dito, of the Bank of America, and likewise the admission in evidence against the defendant Feigenbaum of United States Exhibits 16, 17, 18, 36, 37, 38, 39, 40, 41, 42, 43, 44 and 45. I object to all these matters in the testimony of Dito upon the ground they all have to do with the bank account and the affairs of the Francisco Distributing Com-

pany. They are matters and things of which the defendant Feigenbaum is not shown to have had any knowledge, any control over, acts and things done out of his presence, hearsay as to him, and that in every instance no foundation has been laid for the introduction of any of these documents, checks or statements that were introduced under Dito's testimony, for the reason that there has been no preliminary proof as to the endorsers or depositors, and so forth, of the account. And that includes the so-called signature card, which is supposed to have been the one with which the account was opened for the Francisco Distributing Company in the name of Goldsmith and Weiss. I object to that, which is Government's No. 15, particularly upon all the grounds I have heretofore stated in discussing the exhibits admitted [151] under the testimony of Frank Dito, and upon the further ground that no foundation for the signature card has been presented so far as the defendant Feigenbaum is concerned, and there is no proof that either Goldsmith or Weiss signed or executed the same.

I move that there be excluded, and if it has been admitted, that there be stricken out, so far as the testimony of the Witness Joseph Nathanson is concerned, any computation of the figures he has given so far as the so-called ceiling price under the Emergency Price Control Act of whisky is concerned, on the ground it is not the subject of expert testimony. I think I have covered them all.

The Court: The various motions to strike will be denied and exceptions noted. The Court will adhere

to its ruling that the evidence and the exhibits will be admitted against all the defendants, save in the case of the testimony of the last witness, Mr. Harkins, whose testimony will be admitted as it relates to conversations with the defendant Goldsmith as to him, and with respect to conversations with the defendant Weiss as to him, Mr. Weiss, and with respect to both of them, where the conversations were had with both of them.

Mr. Friedman: Our exceptions to each ruling are noted.

The Court: Each counsel will have his exceptions.

Mr. Riordan: Do I understand that motion is made on behalf now of all the defendants?

The Court: Oh, yes. Let the record show that the specific exceptions that Mr. Friedman has taken with respect to his client made with respect to all the exhibits and testimony are deemed to have been taken by each of the defendants' counsels in like manner and exceptions noted on behalf of each.

Mr. Dunne: Your Honor, we should add to them in some [152] instances with respect to the defendant Goldsmith, with regard to the conversations with the last witness, and we want to state these as objections where the evidence has not gone in, and motions to strike it out where it has gone in, that the testimony is incompetent, irrelevant and immaterial. The testimony of the extrajudicial statements not part of the *res gestae* of a defendant and an alleged party to the conspiracy is not admissible prior to independent proof as to him of the exis-

tence of the conspiracy and the corpus delicti. As to the documents, there was no evidence, aside from such extrajudicial statements that brings home to the defendant Goldsmith any knowledge, information or proof that he had any connection with any documents, bank accounts, or anything else, except such extrajudicial statements of the witness Harkins, and accordingly as to him there was no showing of a connection between him and what purported to be the documents of the San Francisco Distributing Company.

I want to add certain objections to those stated by Mr. Friedman as to Government's Exhibits 2, 3, 4, 5, and 6. There is no identification as to the forms 52-A and 52-B. It is not shown by whom they were made. It appears that they were some place in the files of the witness Jones, or in the files over which he had charge, but there is no showing by any proof of any sort that they were made in the ordinary course of business, no foundation laid for their admission as a record made in the ordinary course of business.

The same goes as to 7 and 8, the freight bills.

Now, without repeating in detail, I do not think—Mr. Friedman can correct me as to this—I do not believe Mr. Friedman made objections to those conversations which were had and the documents introduced in connection with the transactions that were with Mr. Feigenbaum, did you? [153]

Mr. Friedman: Oh, yes, I did.

The Court: He made a motion to strike those.

Mr. Friedman: I made a motion to strike those,

because those had already been admitted as against Feigenbaum.

Mr. Dunn: Because, of course, as to things that happened in Feigenbaum's own presence, our position as to things that happened in his presence is Mr. Friedman's position with respect to Feigenbaum as to what happened in Abel's presence, Blumenthal's presence, and so forth. So we want the record to show that as to each item of evidence in connection with the transactions allegedly participated in by the defendant Feigenbaum, our objection goes that it is incompetent, irrelevant, and immaterial, hearsay, *res inter alios acta*, without foundation, no proof of the *corpus delicti*, and no independent proof of the connection of any defendant with any alleged conspiracy of which Feigenbaum, or any other party with whom Feigenbaum dealt, was a party.

The Court: The record will also show that each of the other defendants has made the same motion, made the same objections with respect to the evidence pertaining to the defendant Feigenbaum.

Mr. Riordan: That is right.

The Court: So the record will be clear on that.

Mr. Dunn: Exception noted as to that.

The Court: Exception noted.

39. Mr. Friedman: During the course of the argument yesterday, Your Honor asked Mr. Colvin whether or not in these transactions where an independent intermediary,—whether or not he considered this independent intermediary was on the same footing with the defendants in this case, that is, on

the same footing as a conspirator, an agent for the conspirators. He answered "yes." [154] While we objected to the admission of that testimony yesterday, for the purpose of completing my record I move the court to strike out so far as the defendant Feigenbaum is concerned, all the testimony given by the witness Victor Figone and by the witness Melvin Avila together with United States Exhibits 26 and 27, a check and an invoice, on the grounds which we urged against the admission of this testimony originally, and upon the further ground that this testimony constitutes simply the extrajudicial statements and acts and declarations of an alleged co-conspirator said and done out of the presence of defendant Feigenbaum, and without any proof of his knowledge, authorization or consent to such statements or transactions.

The Court: Inasmuch as I have granted the motion to apply the testimony of these witnesses, as well as all the testimony, as against all the defendants, I will deny this motion. You may have an exception. Do the other defendants wish to join in this motion * * *

Mr. Wolff: Yes, Your Honor * * *

The Court: It may be so deemed and an exception noted.

40. Mr. Friedman: * * * I will likewise, on the same grounds and for the same reasons, move that the testimony of the witnesses James Cermusco, John Vukota and V. M. Lewis be stricken in so far as the defendant Feigenbaum is concerned, upon all the grounds urged against the admission of such tes-

timony and upon the further ground that the testimony of these three witnesses merely concern the extrajudicial statements and acts of an alleged co-conspirator said and done out of the presence of defendant Feigenbaum and without any proof of his authorization, knowledge or consent. That refers to the testimony together with Government's Exhibits 28, 29, 30, 31, 32 and 33 introduced under such testimony.

The Court: The other defendants join in that motion? * * * [155]

Mr. Wolff: Yes, Your Honor * * *

The Court: The motion will be denied and exceptions noted for all the defendants.

41. Mr. Friedman: I likewise move to strike out the testimony of Walter Vogel and United States Exhibits 45 and 46 upon all the grounds heretofore urged as to the admission of such testimony, and upon the further ground that it is merely testimony relating to an extrajudicial act and declaration of the co-conspirator said and done out of the presence of defendant, and without any proof of his authorization, knowledge or consent thereto.

The Court: Do the defendants join in this motion? * * * (the other defendants indicated their assent).

The Court: The motion will be denied and the exceptions noted for all the defendants.

42. Mr. Friedman: As to the witness Francis Duffy and Exhibits 47, 48 and 49 I move that this testimony and these exhibits be stricken out upon all the grounds that I urged for the striking out of

the testimony and the exhibits given under the testimony of Walter Vogel.

The Court: The same ruling and the same exceptions noted:

43. That the District Court erred in overruling the motion of this appellant at the close of all the evidence for a directed verdict and a dismissal of the indictment, to the denial of which motion this appellant duly excepted.

That the court erred in refusing the following instructions requested by defendant Abel: [156]

44. The evidence in this case is insufficient to warrant the conviction of the defendant Louis Abel and you are, therefore, instructed to return a verdict of not guilty.

Refused; Exception.

45. I charge you that you cannot convict the defendant Louis Abel on suspicious circumstances, no matter how strong the circumstances may be; nor should you return a verdict of guilty on mere conjecture or speculation.

Refused; Exception.

46. A conspiracy to commit a crime is not likely to exist between strangers.

Refused; Exception.

47. The defendant Louis Abel is only on trial for the offense of conspiracy as set forth in the indictment. He is not on trial for the offense of either buying or selling whiskey in excess of or

higher than the maximum price established by law; he is not on trial for the buying or selling of whiskey at all.

Refused; Exception.

48. The indictment in this case charges the defendant Abel with having conspired with Albert Feigenbaum, Lawrence B. Goldsmith, Samuel S. Weiss and Harry Blumenthal to unlawfully sell, at wholesale, certain Old Mister Boston Rocking Chair Whiskey in excess of and higher than the maximum price established by law. If you find from the evidence that the defendant Abel merely purchased or agreed to purchase certain cases of Old Mister Boston Rocking Chair Whiskey from any other defendant in this case or that the defendant Abel merely acted as the servant or agent or for or on behalf of Norman Reinberg or others for the purpose of purchasing for them certain Old Mister Boston Rocking Chair Whiskey from one or more of the other defendants in this case, and if you further find that the said defendant Abel was not acting as the servant, agent or employee of any other defendant in this case and [157] was not acting for or on behalf of any other defendant named in this case, for the purpose of selling said whiskey, then you must return a verdict herein finding the defendant not guilty.

Refused; Exception.

49. If you find from the evidence in this case that the acts and conduct of the defendant Louis

Abel amounted to no more than an action on his part to purchase, either for himself or for some other person, Old Mister Boston Rocking Chair Whiskey, and that he did so purchase said Whiskey, then you must find that the defendant Abel was not a member of the conspiracy set forth and charged in the indictment and you must return a verdict herein finding the defendant Abel not guilty.

Refused; Exception.

50. I instruct you that where a transaction consists on the one hand of the selling of an article that is either prohibited by law or that is being sold in a manner that violates the law, and on the other hand by the purchase of such article by another person, then, under such circumstances, the buyer and the seller are not guilty of a conspiracy to sell such article. Therefore, if you find from the facts in this case that the transaction involved amounted on the one hand to some of the defendants, other than Abel agreeing to sell the whiskey described in the indictment at a price prohibited by law, and on the other hand that the defendant Abel merely agreed to purchase for himself or some other person, some of said whiskey at said price, then you must find that the defendant Abel was not a member of any conspiracy that had for its object the selling of said whiskey, he being merely a purchaser or agent for the purchaser thereof. Under such circumstances you must return a verdict finding the defendant Abel not guilty.

Refused; Exception.

51. If you find from the evidence in this case that the defendant Abel did agree with a man named Reinberg or some other [158] person to sell to either or both of such persons certain Old Mister Boston Rocking Chair Whiskey at a price in excess of the maximum price established by law, but if you also find that the defendant Abel had not agreed with any other defendant in this case to sell any Old Mister Boston Rocking Chair Whiskey at a price above that provided by law, then you must return a verdict herein finding the defendant Abel not guilty on the ground that he was not a member of the conspiracy charged in the indictment.

Refused; Exception.

52. If you find from the evidence that two or more defendants in this case other than the defendant Abel had conspired and agreed together to sell said whiskey described in the indictment at a price in excess of that established by law, and that after the formation of such conspiracy the defendant Abel did do some act either individually or in conjunction with some other person, which act operated in furtherance of the objects of the prior conspiracy, but that in the doing of such act or acts the defendant Abel had no knowledge of the existence of any such conspiracy, then you must return a verdict finding the defendant Abel not guilty for the reason that he never became a member of the conspiracy as charged and set forth in the indictment.

Refused; Exception. [159]

The court erred in giving the following instructions to the jury, to each of which the defendant Abel excepted:

53. However, a person is presumed to intend to do all that which he voluntarily and willfully does in fact do, and must also be presumed to intend all the natural, probable and usual consequences of all his own acts.

54. If such discrepancies or inconsistencies are not material and they do not affect the true issues of this case, and if they do not reasonably bear upon the guilt or innocence of the defendants, or any of them, do not waste your time in considering them.

55. In other words, when an unlawful end is sought to be effected, and two or more persons, actuated by the common purpose of accomplishing that end, work together in any way in furtherance of the unlawful scheme, every one of such persons becomes a member of the conspiracy.

56. Each party must be actuated by an intent to promote the common design. If persons pursue by their acts the same unlawful object, one performing one act and a second another act, all with a view to the attainment of the object they are pursuing, the conclusion is warranted that they are engaged in a conspiracy to effect that object.

57. You may find any one of the defendants either guilty or not guilty, in accordance with the rules and statements as to the law that I have given to you.

In giving the following instructions to the jury:

57. The Court: Then the court will state, for the benefit of the jury, that the court has granted a motion of the Government to admit all the testimony heretofore offered against all the defendants with the following exception: /

That the testimony of the last witness, Mr. Harkins, is admitted in evidence as against the defendant Goldsmith as to [160] conversations had by the witness with the defendant Goldsmith; that his testimony is admitted as to the defendant Weiss with respect to conversations with the defendant Weiss; and as to both defendants Goldsmith and Weiss and as to all conversations at which both defendants Goldsmith and Weiss were present and exceptions are noted as to this ruling on behalf of all the defendants separately.

Wherefore, appellant Abel prays that the judgment and orders appealed from may be reversed.

(Signed) GEORGE G. ÖLSHAUSEN,

Attorney for said Appellant.

(Acknowledgment of Service.)

[Endorsed]: Filed July 21, 1945. [161]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS OF DEFENDANT
SAMUEL S. WEISS

Now comes Samuel S. Weiss, one of the defendants and appellants in the cause numbered and entitled as above, who has heretofore appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment and sentence given, made, and entered against him in said cause in and by the said District Court, and having duly given his notice of appeal in the manner and form provided by law, and by the Rules adopted and promulgated by the Supreme Court of the United States governing appeals in criminal cases, files this, his assignment of the errors upon which he will rely for a reversal of the judgment and sentence aforesaid, and says, that in the record and proceedings aforesaid, as also in the judgment of the plea herein, manifest error hath happened to the grievous damage of him, the said Samuel S. Weiss, in each and every of the following particulars, to-wit:

I.

That said District Court erred in granting the motion of counsel for the United States of America, made at the conclusion of the taking of testimony upon the trial of said cause, to admit all evidence which had been admitted against any defendant as against all defendants and to admit all documents theretofore marked for identification in evidence against all the defendants, to which ruling of the

said District Court this defendant Samuel S. Weiss, in propria persona, duly Excepted.

II.

That the said District Court erred in denying the motion of this defendant at the conclusion of the case for the Government that the Court instruct the jury to find this defendant not guilty, to which ruling and order of the [163] said District Court, this defendant Samuel S. Weiss, duly Excepted.

III.

That said District Court erred in denying the motion made by said defendant Samuel S. Weiss after all the testimony and evidence had been introduced and both sides had rested the case for an instructed verdict of not guilty as to the said defendant Samuel S. Weiss, to which ruling and order of the said District Court this defendant Samuel S. Weiss duly Excepted.

IV.

That the said District Court erred in denying the motion of said defendant Samuel S. Weiss for a new trial, to which ruling and order of the said District Court this defendant Samuel S. Weiss duly Excepted.

V.

That the said District Court erred in denying the motion of said defendant Samuel S. Weiss in arrest of judgment, to which order and ruling of said District Court said defendant Samuel S. Weiss duly Excepted.

VI.

That the said District Court, upon the trial of said cause, erred in admitting in evidence over the objection of said defendant, "U. S. Exhibit 2," the said exhibit being a document entitled "Wholesale Liquor Dealers Monthly Report Summary of Forms 52-A and 52-B," showing the purchases of the San Francisco Distributing Company during the month of December, 1943, as kept in the records of the United States Internal Revenue Department, to which ruling of the court said defendant Samuel S. Weiss then and there duly Excepted.

VII.

That the said District Court, upon the trial of said [164] cause, erred in admitting in evidence over the objection of defendant Samuel S. Weiss, "U. S. Exhibit 3," the said exhibit being a document entitled "Wholesale Liquor Dealers Monthly Summary of Forms 52-A and 52-B," showing the purchases of the Francisco Distributing Company during the month of January, 1944, as kept in the records of the United States Internal Revenue Department, to which ruling of the court said defendant Samuel S. Weiss then and there duly Excepted.

VIII.

That the said District Court erred in admitting in evidence over the objection of said defendant Samuel S. Weiss, "U. S. Exhibits 4, 5 and 6," the same being the so-called 52-A and 52-B records of the Francisco Distributing Company which had been

filed with said United States Internal Revenue Department from the month of March, 1942, to the month of December, 1943, to which ruling of the court said defendant Samuel S. Weiss then and there duly Excepted.

IX.

That said District Court erred in denying the motion of defendant Samuel S. Weiss to strike out the following testimony of the witness Fred A. Sander:

"1426 cases were delivered from the car on arrival."

upon the ground that the same was incompetent, irrelevant, immaterial and hearsay, to which ruling of the court said defendant Samuel S. Weiss then and there duly Excepted.

X.

That the said District Court erred during the examination of the said witness Fred A. Sander in admitting, over the objection of said defendant Samuel S. Weiss, the following evidence: [165]

"(The Witness Continuing): This is a part of that same deal wherein it is delivered from the car —this is stock delivered from the same car out of our warehouse. These invoices regard B & O car 174149, and they are part of the same transaction and the record kept by my firm, and they supplement the Government's Exhibit 13 which I just identified. They are part of the same transaction, the same car. That is our method of handling records. On one set of records we kept actual deliver-

ies taken from rail cars, and then future deliveries made from that stock. That last group of papers refers to an additional group of shipments than those contained in the last exhibit.

Mr. Weiss: Your Honor, at this time I would like to say I never gave him those. I am willing to have bills that I gave him admitted but those I do not know anything about I would rather object to their admission.

The Court: Well, in the form you make the objection, I will overrule it. I do not know what you are getting at. You may have an exception to the court's ruling.

The Witness: This is—we will take this as an example—an order for the entire operation for the distribution of that car. It reads 'Deliver to Dillons,' with a certain address, and an order number which reads—these are delivery orders, our instructions to deliver merchandise. This here attached is a report of the serial numbers of each case that went out on this order. The first pink document on top is the delivery order given to me by Mr. Weiss. Before deliveries of case whiskey can be made, we are required to take the number off—a record of the [166] number off each case and report it to the actual owner of the merchandise. The first is an order for my company to do certain things with the merchandise. The second sheet attached to the order is a list of the numbers of the particular merchandise I allocated to that order. This is a copy of the bill of lading on which the shipment was made. Our shipment to the customer that is repre-

sented on this order, that is a regular commercial document made up by all transportation people. It is the document of my own company. The next paper, as I stated before, is another order, the procedure of which is like the first one, I just—the rest of them are just duplicates of the first, referring to different points of delivery and different cases of whiskey. We make up bills of lading on all cases of distilled spirits moving out of our warehouse, whether city deliveries or shipments. Thereupon, counsel for the Government offered the document in evidence, to which counsel for the defendant Goldsmith objected upon the ground that it was incompetent, irrelevant and immaterial, self-serving and not binding upon the defendant Goldsmith. The Court admitted the document in evidence as to the defendant Weiss. The defendant Weiss objected to the same, and the Court overruled the objection, to which the said defendant Weiss duly Excepted. The documents were marked U. S. Exhibit 14 in evidence."

XI.

That the said District Court erred in giving the following instruction to the jury during the course of the examination of the witness Joseph N. Nathanson, as more fully appears from the record as follows, to-wit: [167]

"The Court: I will instruct the jury at the present time that pursuant to the authority given to him by statute, the Price Administrator on May 22, 1943, promulgated an Order No. 5 in which he fixed

the maximum prices for all sales by Ben Burke, Inc., Foster & Company, and American Distilling Company as follows: that on or after May 24, 1943, Ben Burke, Inc., Boston, Massachusetts, Foster & Company, New York City, and American Distilling Company, Beacon, Illinois, may sell and deliver to any person, and any person may buy and receive from those sellers Old Mr. Boston Rocking Chair Whiskey, a blend of straight Bourbon whiskies, 80.6 proof, aged as above, at the following prices: \$19.24—that is not in issue; that is another kind of whiskey?

Mr. Golvin: That is for pints.

The Court: \$15.37 plus \$3.87, being the amount of the increased Federal excise tax of November 1, 1942, applicable thereto, or a total of \$19.24 per case of 12 bottles, each bottle containing one-fifth gallon of such whiskey.

Now, do you wish to take an exception to that?

Mr. Friedman: Yes, your Honor. I wish to object to what your Honor has told the jury, and I ask your Honor to instruct the jury to disregard anything you have just read from the Federal Register or advised them about, upon the following grounds:

First, that the purported order is only an order that regulates processors of these particular distilled spirits; it has nothing to do with wholesalers; it has nothing to do with people who buy from [168] wholesalers or jobbers—that is the portion you have instructed the jury about—and therefore that this portion of the order is not binding upon Mr. Fei-

genbaum in this case, who is neither a processor nor a wholesaler of distilled spirits.

Secondly, upon the ground that the order on its face is in violation and in excess of the power conferred by the Emergency Price Control Act for these reasons: that under the Emergency Price Control Act the Administrator has the power by general order and by general order only to fix the prices of any commodity within a particular area or region, and that he has not the power and never was given the power by Congress to fix different prices for different people for the manufacture of the same kind of article, and this is a special order applicable only to certain people.

The Court: Do you propose to follow this up with further regulations with respect to the prices fixed for sale at wholesale?

Mr. Colvin: Yes, your Honor.

The Court: And this is preliminary to that?

Mr. Colvin: Yes, Your Honor.

The Court: I will overrule the objection, and an exception may be noted.

Mr. Duane: If the Court please, in behalf of the defendant Goldsmith I desire to offer the objection that this testimony and this regulation for this purpose is incompetent, irrelevant and immaterial. We are not here charged with any dealings with Burke or the American Distillery or anyone else.

The Court: I understand that.

Mr. Duane: We urge our objection on that ground.

The Court: I have instructed the jury as to

that regulation and overrule the objection upon the statement of the District Attorney that it is preliminary to showing a further price regulation for sales by wholesalers. There may be some connection there. I can't see that that would do any harm.

Mr. Friedman: I would ask your Honor to limit this testimony so that it does not go in as against the defendant Feigenbaum, who is not within either of the categories mentioned by Mr. Colvin.

Mr. Riordan: Before the Court rules on that may I for the record, for the defendant Blumenthal, adopt the objections made by Mr. Friedman and Mr. Duane, and object upon the further ground that it is an unlawful delegation of power in any event, also reiterating Mr. Friedman's objection particularly as to Mr. Blumenthal, that this is in no way binding upon the defendant Blumenthal as far as this evidence goes, because of the fact that there is no tie-in regarding any records here, everything that has been introduced at this time concerning it, I realize your Honor has that in mind.

The Court: I will instruct the jury that the instructions as to this order of the Price Administrator are now only being considered by the jury as against the defendant Goldsmith and if it is connected up with the other defendants it may be admitted later as to them. [170]

Mr. Duane: May I, then, in behalf of the defendant Goldsmith, your Honor, make this further objection: that the order referred to an order promulgated by the Office of Price Administration, and the Price Administrator, is invalid and void, and

that such order was adopted by the use of a delegation of power which of itself was invalid in this case.

The Court: ~~That objection will be overruled~~ and an exception noted.

Mr. Duane: Exception.

Mr. Riordan: "Exception."

to which rulings of the court said defendant Weiss also duly Excepted.

XII.

That the said District Court erred in permitting the witness Nathanson to give the following testimony and in overruling the following objections thereto, as appears from the record in the words and figures following, to-wit:

"(The Witness, Continuing): I am familiar with Maximum Price Regulation 445, published at 8 Federal Register 11161. That Regulation establishes the maximum price per case for the sale by a wholesaler of a case of twelve bottles, each of which twelve bottles contains one-fifth of one gallon of Old Mr. Boston Rocking Chair Whiskey, distilled by Ben Burke, Inc., said sales occurring during the months of December, 1943, and January, 1944, in this district and relating to transactions recorded in this freight bill which I have examined. Counsel for the defendant [171] Feigenbaum objected to the question on the ground that the Regulations were the best evidence. Thereupon, counsel for the Government, Mr. Colvin, stated that the

Maximum Price Regulation as to wholesale sales of distilled beverages in this district was not fixed by one single regulation but by formula, the first, or No. 5 under Maximum Price Regulation 193 which sets the maximum cost to the wholesaler at \$19.24, the second component being the local tax which arises under Section 24 of the California Alcoholic Beverage Act, which sets the price of twelve 1/5 bottles of distilled beverage at \$1.92, and that the next element of the price arose from the actual freight charge which, in this case, was 81c. Counsel for the defendant Blumenthal objected to the statement upon the ground that counsel for the Government was stating evidentiary matter and assuming matters not in evidence. The Court stated that the jury should not take into account the statements of counsel as to the evidence unless satisfied that counsel was correctly stating the evidence, but that the Court assumed that Counsel for the Government was trying to explain the Regulations that fix the price, which was the price charged by the distiller to the wholesaler, plus the California Tax, plus the freight. Counsel for the Government stated that the statement of the Court was correct, and that, taking the three components, Regulation MPR 445, section 5.4, provided the multiplication of those component parts by 1.15 in order to establish the maximum wholesale price in this district, arising from the freight charge, the tax and the maximum cost to the wholesaler. [172]

Mr. Colvin: Mr. Nathanson, how do you calculate the price as to Old Mr. Boston Rocking Chair

Whiskey distilled by Ben Burke and Company for cases of fifths, which were shipped as recorded in the freight bills which are Government's Exhibits Nos. 7 and 8 in evidence? Counsel for the defendant Feigenbaum objected to the question but, before the objection was completed, the Court stated that the evidence was being admitted only as against the defendant Goldsmith. Counsel for defendant Goldsmith objected to the question upon the ground that the matter was one of calculation and that many persons would not understand how to make the calculation. The Court overruled the objection, to which ruling of the Court counsel for the defendants duly Excepted.

(The Witness, Continuing)⁶: The wholesaler's price to the retailer under Maximum Price Regulation 45 is based upon the percentage mark-up of 1.15 on his net cost. The net cost has three elements. The first is the net purchase price through November 2, 1942; the next item is the freight from the shipping point to the receiving point; the third element of cost is the State Excise Tax. In this instance the price from the distiller to the wholesaler through November 2, 1942, was \$19.24, because that reflects the increased taxes of November 1st, 1942. The freight to San Francisco per case is 81c. The State Excise Tax on a case of fifths, \$1.92, making a total of \$21.97. Then, we apply the percentage markup that is allowed the wholesaler, multiply that 1.15 or \$21.97, which gives the total sum of \$25.27 per case. That would be the price from the

wholesaler to the retailer FOB San Francisco for the particular merchandise." [173]

to the admission of the aforesaid evidence and the rulings aforesaid the Court duly allowed this defendant an Exception.

XIII.

That the said District Court erred during the examination of the witness Reinburg in admitting the following evidence overruling the objections thereto made by counsel for certain other defendants, to which rulings by virtue of the order of the said District Court the defendant Weiss was allowed an Exception:

"(The Witness Continuing):

During this period of time I traveled to San Francisco with Mr. Abel on two occasions. The first occasion was about the 6th or 7th of December. I took Mr. Abel with me in my car. I took him in the downtown section here about three or four blocks off Market, around Third or Fourth. The place was a jewelry store pawn shop, sports goods, I let Mr. Abel off at this sports goods shop. I had a conversation that I would pick him up there in half an hour. I drove down there on the date of the first trip at Mr. Abel's direction. He did not say to drive to this particular sports goods shop; he said 'up that street, down that street and stop here'.

Counsel for the defendants Abel and Blumenthal objected to this testimony; The Court overruled

the objection, to which ruling counsel for the said defendants duly Excepted.

(The Witness Continuing):

I subsequently, pursuant to the arrangement [174] which I had made, came back and picked Mr. Abel up and brought him back to Vallejo. I did not have a conversation with him regarding his trip to that place. I made a second trip to San Francisco with Mr. Abel about the 16th or 17th of December. I traveled to San Francisco the same way, in my car. I took him over and brought him back. I took him to the same section of the city, about three blocks off Market, about Third Street there. I observed Mr. Abel going in this pawn shop and sports shop, which I named. I did not have any conversation with him regarding taking him to that place on the way down; just that I would meet him there. He said he would meet me at the same place, dropping him off at the same place, that was all. I picked him up about a half hour later and brought him back to Vallejo, just as I did before. In the meantime I was around town, just waiting. I made more trips to San Francisco during the month of December. I came over and tried to get some more whiskey without paying that price. I went to the Francisco Distributing Company. That was around the 10th of December. It was after the first trip I made and before the second one to the Francisco Distributing Company. The same man was behind the counter. He wouldn't give me any business at all. I do not see that man in the court room. I did

not make a purchase of any whiskey at that time. After visiting there, I went down to the pawn shop where I left Mr. Abel off on the first occasion of my trip to San Francisco. I went into the pawn shop. I tried to do business with whiskey and nobody talked to me. They weren't interested. I do not remember what person I saw in that pawn shop. I was unable to do any business at the pawn shop. [175] They did not say that they sold whiskey there. They didn't know what I was talking about. At that time I returned to Vallejo."

XIV.

That the said District Court erred in overruling the following objections during the examination of the witness John Giometti, and in overruling the following objections made by counsel for certain of the other defendants, to which rulings and to the admission of the testimony admitted thereby, the defendant Weiss by virtue of the aforesaid order of the Court, was allowed an Exception:

"I have the Owl Cafe, 121 Georgia Street, Vallejo, California, and hold a liquor license at those premises. I was in that business during the month of December, 1943, and the month of January, 1944. During those months, I purchased some Old Mr. Boston Rocking Chair Whiskey from the Francisco Distributing Company. I paid \$65 a case for that whiskey. I gave a check to Norman Reinburg and the cash, and he got me the whiskey.

Counsel for the defendants Blumenthal and Feigenbaum objected to the evidence as not binding

upon the said defendants, and the Court stated that it was admitted only as against the defendant Goldsmith. Counsel for the defendant Goldsmith objected upon the ground that there was no foundation for the testimony as to the defendant Francisco Distributing Company, and no evidence containing it, so that the witness Reinburg repeated the same, and the Court struck out the testimony of the witness that he made the purchase from the Francisco Distributing Company. [176]

(The Witness Continuing):

I purchased 50 cases of Old Mr. Boston Rocking Chair Whiskey. I had the conversation regarding the purchase of the whiskey with Norman Reinburg. The conversation took place early in December of 1943—say the 6th or 7th. Just Mr. Reinburg and I were present. The conversation took place at Norman Reinburg's place of business. Subsequent to that conversation, 50 cases of Old Mr. Boston Rocking Chair Whiskey were delivered to me, I would say, in February, 1944. I seen the invoice now shown me entitled 'Francisco Distributing Company No. 10171'. I saw that when I got the delivery of the whiskey. The Kellogg Express Company gave me the bill and the invoice; that invoice was kept by me as a record of my business directly under my care and custody. That is the shipping bill to which I have referred. The shipping bill and the invoice were delivered to me together. The said invoice was marked U. S. Exhibit 24 for identification and the shipping bill, U. S. Exhibit 25 for identification. I gave the check

and the cash for the whiskey to Norman Reinburg. The check was made out to Francisco Distributing Company. It is not in my possession. I got this cashier's check from the Bank of America and paid \$1,225 for it. I gave the check to Mr. Norman Reinburg.

Q. At that time, did you give any cash to Norman Reinburg?

Counsel for the defendants Goldsmith, Abel and Feigenbaum objected to the question upon the ground that the evidence was not binding upon the said defendants. The court overruled the said objection, to which ruling of the Court counsel for the defendants duly Excepted. [177]

The Witness: I gave him the balance of the \$65 a case.

(To the Court): \$2,025.

Subsequent to that time I had a conversation with Mr. Louis Abel regarding this transaction. I would say the conversation took place after I received the first shipment, I would say a couple of months after I received the whiskey previously. He had a jewelry store in front of Mr. Norman Reinburg's place. The conversation took place inside of the jewelry store. Beside Mr. Abel and myself, some fellow was present representing Hart's Distributing Company. That is a liquor company.

Mr. Colvin: Q. What was that conversation with Mr. Abel regarding your purchase of this whiskey?

Counsel for the defendants Goldsmith and Abel objected to the question, the former on the ground

that it was incompetent, irrelevant and immaterial, and counsel for the defendant Abel objecting upon the same ground and upon the further ground that it was not within the issues of the subject-matter of the conspiracy charged in the indictment, for the reason that anything that the defendant Abel may have said, if it was subsequent to the conclusion of the transaction, would not be within the issues, and would not be competent or pertinent after the transaction had been concluded. The Court overruled the said objection, to which ruling counsel for the said defendants duly Excepted.

The Witness: He said he could get me some whiskey if I wanted to get it, and he said he could probably get it a little cheaper, and in that way— [178] well, he said he would save me \$5 a case; \$60 a case, so I told him I paid \$65 a case for it once, and I wouldn't go for it again. That was all that was said. He said the whiskey I got at Francisco Distributing Company went through his hands, and he could get me the same deal. He said he just took the money I gave Norman Reinburg, the money I gave to Norman Reinburg was given to him, and he took it to the 'big shot', and he could get me the figure of \$60 a case, and I wouldn't go for it no more because I figured I was paying too much for it in the first place, and I didn't think I would get a legitimate bill. He did not say who the 'big shot' was. He said the 'big shot' was in San Francisco."

XV.

That the said District Court erred during the examination of the witness Victor Figone, in denying the motion to strike out the following testimony:

"During the month of December, 1943, I made a purchase of Old Mr. Boston Rocking Chair Whiskey. I purchased the whiskey from some gentleman in the Francisco Distributing. I understood that the man's name was Weiss."

to which ruling the defendant Weiss duly Excepted.

XVI.

That the said District Court erred in denying the motion to strike out all of the testimony of the witness Milton Avila on the ground that the same was hearsay, to which ruling defendant Weiss was allowed an Exception.

XVII.

That the said District Court erred in overruling the [179] following objection, and in admitting the following testimony during the examination of the witness James Cermusco:

"Mr. Colvin: Q. At whose direction did you stop at that place on Third Street?

Mr. Riordan: I object to that as incompetent, irrelevant and immaterial as to the defendant Blumenthal. We are not bound by any directions.

The Court Overruled the said Objection of Mr. Riordan, to which counsel for the defendant Blumenthal Excepted.

*The Witness (to the Court):

The man who was driving the car stopped there. He was the man who said he came from the Francisco Distributing Company. I have seen the check now shown me, entitled, 'Livermore Office, American Trust Company,' made out to the Francisco Distributing Company for \$450. I had this one myself. I got it from Mr. Vukota. I had given that check to the man who said he was from the Francisco Distributing Company. I gave one of these checks to that man in the early part of December, and one was in the early part of January. I gave one of these checks to that man on the day I took the ride along Third Street with him. I didn't give him the money on Third Street, though. We then drove, from Third Street, we went down around Market, we came back around Second Street, and then we went down near Townsend Street. Right there we parked the car and I gave him the money. I gave him the check for \$450. The check for \$2,000 was given to him the early part of December."

To the above ruling of the Court, the defendant Weiss was allowed an Exception. [180]

XVIII.

That the said District Court erred in admitting over the stated objection of defendant Weiss the following testimony:

"Q. What conversation did you have with Mr. Feigenbaum on that date regarding the whiskey?

Mr. Friedman: I will object to that on the

ground that it is incompetent, irrelevant and immaterial; the proper foundation is not laid. We have no proof of the corpus delecti, or any fact, act, statement or declaration of any alleged co-conspirator.

The Court: Objection overruled. Exception noted."

Pursuant to the order of the Court heretofore referred to, this exception was deemed to be an Exception by the defendant Weiss.

(The Witness Continuing): I had a conversation with him. I asked him, 'Where is our whiskey?' We were worried about it. We hadn't heard anything from this liquor. So he told us it would be in soon, and it would be shipped to us. At that time he told me the name of the whiskey was The Old Rocking Chair, and he showed me a bottle he had in his desk drawer. That was a fifth. I did not open the bottle there. I asked him what kind of whiskey it was, and how good it was, and I made a deal with him then to buy a case of whiskey to take down to Los Angeles with me. That was in addition to the other purchases. I paid him \$64 for that case in cash. I told him I would take the 100 cases, and he wrote a check out to me, H. L. Taylor, and I endorsed it back to him. He wrote a [181] check to me for \$2450. He asked me to endorse that so that I would put him in the clear.

(To the Court): That would give us, instead of taking 200 cases, which we were billed for, the \$4900. That would give us just the 100 cases for

\$64 a case, so he wrote the check for \$2450, and had me endorse it back to him. He signed that check in my presence. I did not receive any cash for it when I endorsed it. I told him I had to be going, I was going to Los Angeles, and we wanted to get our whiskey as quick as we could. We gave him instructions previous to that. I had no subsequent dealings with him."

XIX.

That the said District Court erred in admitting over the objection made thereto, the following testimony of the witness Ruth Taylor:

"I have seen this check to Francisco Distributing Company for \$4,900 now shown me. That is my check, and that is my signature that appears thereon. I wrote that check myself on December 9, 1943 in the Sunset Drugstore in the rear of the drugstore. At that time, my husband, Mr. Humes and Mr. Feigenbaum, and a man named Mr. Tucker and another fellow they call Little Joe were present. I wrote that check at Mr. Feigenbaum's instructions. He told me to whom to make the check payable. He told me the amount for which I was to write the check. I did not witness the payment in cash of any money to Mr. Feigenbaum on that occasion. I had given my husband the money, but didn't [182] see him present it to Mr. Feigenbaum. At that time I had given my husband a certain amount of cash after he had parked in front of the drugstore. (here) \$1,000 in hundred dollar and fifty dollar bills. I happened to have the cash with

me, and I gave it to him. There was a discussion about writing the check.

Q. What was that discussion?

Mr. Friedman objected to the question on the ground that it was immaterial and irrelevant as against the defendant Feigenbaum, and that it called for acts, declarations and transactions participated in and performed by defendant Feigenbaum when the substance of the offense charged had not yet been established.

The Court overruled the objection, to which counsel for the defendant Feigenbaum duly Excepted."

To this ruling the defendant Weiss, by virtue of the order aforesaid was allowed an Exception.

XX.

That the said District Court erred in admitting over the *objected* stated thereto the following testimony of the witness Humes;

"Q. What was that conversation you had with Mr. Feigenbaum?

Mr. Friedman objected to the question upon the ground that it called for the act or declaration of payment on the part of the alleged co-conspirator in the case, and that there had been no proof of the corpus delicti.

The Court overruled the said objection, to which counsel for the defendant Feigenbaum duly excepted. [183]

(The Witness Continuing):

We were introduced to Mr. Feigenbaum by Little

Joe and Mr. Feigenbaum wanted to know what we would have, and we told him we wanted 100 cases of whiskey. He said, 'Yes, I think I can get it for you'. Nothing was said about the deposit right at that time. He said he would get us 100 cases of whiskey, and he would have a check for it for \$24.50 a case. He told us that the whiskey would cost us altogether \$64 a case. It was then that I had the discussion about the \$500 I had paid. He said it was a good thing we got down on that date or we would have forfeited the \$500. Mr. Feigenbaum said that. We had a conversation then about the number of cases we were going to take. We were talking about 100 and Feigenbaum wanted to know if we couldn't take 200. I thought it was a little too steep for myself and I said that. Then Mr. Taylor and him and I got talking about how we could use the 200 so we were to make out the check for 200 cases, which was \$4,900. The check for \$4,900 was made out after our statement that maybe, we could take 200. We asked him about the whiskey, if we could take the whiskey up on a truck with us to Cottonwood. He said the whiskey wasn't in. He said it would be about a week or ten days, that the whiskey would come in on a car, and that they would send it up by truck. If not, we would receive it by freight. We asked him where the distributor was, and he didn't say. He asked fifty cents a case to pay for the freight. He was paid an amount of money for the freight in addition to the \$500 deposit and the check for \$4,900. He was paid the further amount

of \$1,050. Mr. Taylor paid that money to Mr. Feigenbaum in my presence. Mr. Feigenbaum [184] then said he wanted a check for \$24.50. He said that went to the distributor. He said we would have to come through with \$1,050 in cash. I think that is about all the discussion at that time."

To this ruling, the defendant Weiss, by virtue of the order aforesaid, was allowed an exception.

XXI.

That the said District Court erred in admitting over the objection stated, the following testimony of the witness Vogel:

"Q. Did you give any cash to this man in addition to this check?

Counsel for the defendant Goldsmith objected to the question as being without foundation.

The Court overruled the said objection, to which counsel for the defendants Goldsmith and Feigenbaum duly excepted, and the Court allowed an exception as to all the defendants.

(The Witness continuing):

I did not give any cash at that time to this man when I gave him the check. After he brought me the bills, I gave him the cash. He told me I would have to pay him for getting the whiskey. I have seen this document entitled, 'Francisco Distributing Company, No. 10092'. I received this document from that man about an hour and a half or two hours after I gave him the check; he came back with this. Both of these transactions took place

on the same day, which was December 6, 1943. When he came back about one hour and a half later, I am sure he was the man to whom [185] I had given the check. I think I gave him \$3,400 in cash. I paid \$24.50 for the whiskey. That was for 100 cases. (To the Court): I mean, \$2,450, or \$24.50 a case for 100 cases. We talked about the whiskey. That took place in my place of business about four o'clock. There was no one present beside this man and myself. He asked me if I wanted to buy whiskey. I said yes, I needed whiskey very bad. He asked me how many cases. I said, 'Well, how many can you get for me'. I thought he was going to say 10 cases, but he said, 'I can get 100 cases'. I said, 'All right, I will take 100 cases', so I asked him how much is it, a case. He said, 'It is \$24.50 a case', I said, 'Is that all'. I thought it was kind of cheap. So he said, 'Well, that is all for the whiskey'. But he said, 'Now, then, you have to pay me for getting the whiskey for you'. So then he told me to make him out a check for the whiskey. I think he wanted the cash, and I wouldn't give him the cash until he brought back the bill, so he brought back the bill. I gave him the cash that he asked. I think it is \$3,400. We figured it out later. The whiskey stood me \$59 a case. I did not have a conversation about the ceiling price with him. He told me to make out the check to the Francisco Distributing Company for \$2,450. I subsequently received 100 cases of Old Mr. Boston Rocking Chair Whiskey in cases of fifths. I checked the shipment after it

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arrived in the warehouse. I kept it in the San Francisco Warehouse Company. I would draw on it two or three cases at a time. It was put in my name, and I paid the storage. It was left in the warehouse in my name. I wouldn't say the man who sold me the whiskey was a heavy-set man. He was [186] about a man of medium build. As I remember, he was a dark-complected man. I didn't notice any peculiarities of speech that he had, or any other outstanding physical characteristics."

XXII.

That the said District Court erred, in admitting over the objection stated, the following testimony of the witness Harkins:

"I had one conversation later than January, 1944, with Mr. Weiss, on May 14, in this building. Beside myself and Mr. Weiss, Mr. Colvin was present.

Q.. What was that conversation?

Mr. Weiss, in his own proper person, objected to the question on the ground that it was subsequent to the termination of the conspiracy, and hearsay, and that the corpus delicti had not been established. The Court Overruled the Objection, to which the said defendant duly Excepted.

The Witness (continuing): Mr. Weiss. stated that it was true that he received half of the \$2 commission paid to the Francisco Distributing Company for clearing this whiskey through their books, and he finally refused to answer who actually owned the whiskey. He said, 'I don't want to

involve myself.' Mr. Weiss said he knew Mr. Blumenthal, but he refused to state, to the best of my recollection, positively, whether Mr. Blumenthal was the owner of the whiskey or not."

XXIII.

That said District Court erred in overruling the objections to the admission of all the evidence and exhibits [187] in the case against all the defendants, which said objections and motions, and the specific grounds therefor, were stated by Mr. Friedman, counsel for the defendant Feigenbaum, and were adopted by this defendant Weiss, which said objections and motions, and the said rulings of the Court thereon from the record and proceedings herein fully and at large appear, and are fully set forth in Feigenbaum's assignment of error XVII and to which rulings of the Court thereon, this defendant Weiss duly Excepted.

XXIV.

That the said District Court erred in denying the following motion for a directed verdict of not guilty made by the defendant Weiss at the conclusion of the Government's case, as appears from the record as follows, to-wit:

"The Court: Very well. The record will so show.

Mr. Weiss: I ask the Court if the record might show that I adopt the motions as made by Mr. Friedman, Mr. Dunne, Mr. Wolff, and Mr. Riordan. I would also like to urge this course specifically as to the testimony of Mr. Victor Figone, who was

the only witness in this case whose testimony, if true, would have shown some conspiracy with the others in this particular case. However, the record will show what the testimony of Mr. Figone is, or was, and I would ask the Court to dismiss the case and grant the motion for a directed verdict."

XXV.

That the evidence was, and is, insufficient, as a matter of law, to support or justify the verdict of the jury.

XXVI.

That the indictment does not charge any crime or offense, or any conspiracy to commit any crime or offense [188] against the United States of America, or any conspiracy to violate any Regulation of the Price Administrator issued or adopted under the powers conferred upon him by the Emergency Price Control Act (U. S. C. A., Title 50, Appendix), and that by reason thereof, the said District Court had no jurisdiction of the said cause, or to try this defendant thereon, or to pass judgment or sentence therein on this defendant.

Wherefore, said defendant Samuel S. Weiss prays that the aforesaid judgment and sentence of the said District Court be reversed, and that he go hence sine die.

Dated: July 20, 1945.

(Signed) SAMUEL S. WEISS

In Propria Persona

(Acknowledgment of Service.)

[Endorsed]: Filed July 21, 1945. [189]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS OF DEFENDANT
LAWRENCE B. GOLDSMITH

Now Comes Lawrence B. Goldsmith, one of the defendants and appellants in the cause numbered and entitled as above, who has heretofore appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment and sentence given, made and entered against him in said cause in and by the said District Court, and, having duly given his notice of appeal in the manner and form provided by law, and by the Rules adopted and promulgated by the Supreme Court of the United States governing appeals in criminal cases, files this, his assignment of the errors upon which he will rely for a reversal of the judgment and sentence aforesaid, and says, that in the record and proceedings aforesaid, as also in the judgment of the plea herein, manifest error hath happened to the grievous damage of him, the said Lawrence B. Goldsmith, in each and every of the following particulars, to-wit:

I.

That the indictment on file in the above entitled cause does not state facts sufficient to constitute any crime or offense against the United States of America.

II.

That the said indictment does not state facts sufficient to charges this defendant, Lawrence B. Goldsmith, with any crime or offense against the United States of America.

III.

That the said indictment does not state facts sufficient to charge this defendant, Lawrence B. Goldsmith, with any conspiracy to commit any crime or offense against the United States of America.

IV.

That said indictment is upon its face a nullity, in this, to-wit, that it alleges that the defendants therein named, [191] conspired, confederated and agreed with, and among themselves, and with divers persons to the grand jurors unknown, to violate certain regulations adopted by the Price Administrator and that it appears upon the face thereof that one of the said price regulations at the times mentioned in the said indictment, had been repealed and superseded, and that the other price regulation therein named, had not been adopted or issued, and was not in effect at any of the times in the indictment set forth.

V.

That said indictment does not charge this defendant with any crime, or offense, or with any conspiracy to commit any crime, or offense against the United States of America, and is, therefore, a nullity, and for the further reason that a conspiracy to violate a price regulation issued and adopted by the Price Administrator is punishable as a misdemeanor under the provisions of section 925-B of Title 50, U.S.C.A., and is not indictable or punishable as a felony under the provisions of section 88 of Title 18, U.S.C.A.

VI.

That the said indictment is void, and the conviction of this defendant thereon, a nullity, and that the said District Court had no jurisdiction to hear and determine the same, or to try this defendant thereon, or to render judgment against this defendant, and that the verdict of the jury in the cause entitled above was, and is, null and void for the reason that Maximum Price Regulation 193 and 445 were, and are, and each of said Regulations was, and is, so indefinite, vague, and uncertain, that no person of common understanding reading the said regulations, or either of them, could know or ascertain what act or acts, were prohibited thereby.

VII.

That, by reason of the matters and things set forth in the next preceding paragraph, the conviction of this defendant, Lawrence B. Goldsmith, upon the said indictment and the judgment and sentence pronounced against him upon said conviction, violated the provision of the Fifth Amendment to the Constitution of the United States that no person shall be deprived of life, liberty, or property, without due process of law.

VIII.

During the course of the trial, evidence was offered which in terms and on its face applied to only one defendant or only to certain defendants or was claimed to so apply. At the time said evidence was so received, it was admitted only as against the defendant as to whom, in terms, it was applied and

only as against the defendant with whom the witness so testifying dealt, or was claimed to have dealt. At the close of all of the evidence, the Government moved that all of the testimony and evidence admitted as against any defendant be admitted as against all defendants, and that all documents theretofore marked for identification be admitted as against all defendants. Said motion was opposed by defendant Lawrence B. Goldsmith upon the grounds that the evidence was incompetent, irrelevant and immaterial, was without foundation, was evidence of acts and declarations of persons other than said defendant, not made in the presence of said defendant and not connected with him, and was hearsay and that the corpus delicti of the conspiracy had not been established and that there was no evidence to show that the defendant Lawrence B. Goldsmith was a member of any conspiracy. [193] The said district court erred in granting the said motion of the Government over the said objection of defendant Lawrence B. Goldsmith, to which ruling said defendant duly excepted. All of the said matter more fully appears from Defendants' Bill of Exceptions herein, in which the grounds of objection as to the items of evidence were specific and detailed and since said motion and objections went to substantially all of the evidence in the case, all set out at length in said Bill of Exceptions, reference is hereby made to said bill of exceptions for a statement of said evidence, and the same is incorporated as a part of this assignment.

IX.

That the said distriet court erred in denying the motion of this defendant at the conclusion of the Government's case, that the court instruct the jury to find this defendant not guilty, upon the ground that there was no evidence that this defendant was party to any conspiracy, that the evidence is insufficient to support a verdict or judgment of guilty as to defendant Goldsmith, the offense sought to be charged in the indictment has not been proved, that the conspiracy alleged has not been proved, that the evidence does not exclude every other reasonable hypothesis except guilty so far as defendant Goldsmith is concerned, and is as consistent with his innocence as with his guilt and that the only evidence tending to establish the alleged conspiracy or defendant Goldsmith's connection therewith consists of extra-judicial acts and declarations of third persons unknown to said defendant and not in his presence and without his consent, or statements or acts attributed to him without independent proof of the corpus delicti, to which ruling and order of the court defendant Lawrence B. Goldsmith [194] duly excepted, all as more fully appears from Defendants' Bill of Exceptions.

X.

That the District Court erred in denying the motion of defendant Lawrence B. Goldsmith after the conclusion of all of the testimony in evidence, and after both sides had rested the case, for an instructed verdict of not guilty as to said defendant Lawrence B. Goldsmith, made on all of the grounds

stated in Assignment IX above, to which ruling and order of the court counsel for defendant Lawrence B. Goldsmith duly excepted, as more fully appears from Defendants' Bill of Exceptions.

XI.

That the said District Court erred in denying the motion of said defendant Lawrence B. Goldsmith, for a new trial, to which ruling and order of the said District Court counsel for this defendant Lawrence B. Goldsmith duly excepted, all as more fully appears from Defendants' Bill of Exceptions.

XII.

That the said District Court erred in denying the motion of the said defendant Lawrence B. Goldsmith, in arrest of judgment, to which order and ruling of said District Court counsel for said defendant Lawrence B. Goldsmith duly excepted, all as more fully appears from Defendants' Bill of Exceptions.

XII.

That the said District Court, upon the trial of said cause, erred in admitting in evidence over the objection of counsel for said defendant that the same was incompetent, irrelevant and immaterial and not within the issues, "U. S. Exhibit 2," the said exhibit being a document entitled "Wholesale [195] Liquor Dealers Monthly Report Summary of Forms 52-A and 52-B," showing the purchases of the Francisco Distributing Company during the month of December, 1943, as kept in the records of the United States Internal Revenue Department, to

which ruling of the court, counsel for the said defendant Lawrence B. Goldsmith, then and there duly excepted.

XIV.

That the said District Court, upon the trial of said cause, erred in admitting in evidence over the objection of counsel for said defendant, being the same objection made to "U. S. Exhibit 2," "U. S. Exhibit 3," the said exhibit being a document entitled "Wholesale Liquor Dealers Monthly Report Summary of Forms 52-A and 52-B," showing the purchases of the Francisco Distributing Company during the month of January, 1944, as kept in the records of the United States Internal Revenue Department, to which ruling of the court counsel for said defendant Lawrence B. Goldsmith then and there duly excepted.

XV.

That the said District Court erred in admitting in evidence over the objection of counsel for the said defendant Lawrence B. Goldsmith that the same and each was, incompetent, irrelevant and immaterial and without foundation and no part of the res gestae, "U. S. Exhibits 4, 5 and 6," the same being the so-called 52-A and 52-B records of the Francisco Distributing Company which had been filed with said United States Internal Revenue Department from the month of March, 1942, to the month of December, 1943, to which ruling of the court, counsel for the said defendant Lawrence B. Goldsmith then and there duly excepted. [196]

XVI.

• That the said District Court erred in denying the motion of the said defendant Lawrence B. Goldsmith, to strike out the following testimony of the witness Fred A. Sander:

“1426 cases were delivered from the car on arrival.” Upon the ground that the same was incompetent, irrelevant, immaterial and hearsay, to which ruling of the court counsel for the said defendant Lawrence B. Goldsmith then and there duly excepted.

XVII.

That the said District Court erred in overruling the objection of counsel for the said defendant Lawrence B. Goldsmith to the following testimony of the witness Fred A. Sander:

“Q. Mr. Sander, who, if anyone, instructed you regarding the unloading of the two freight cars whose numbers appear in your records?”

Counsel on the grounds the same was incompetent, irrelevant and immaterial and assumed something not in evidence, [197] and in permitting the witness to answer the said question as follows, to-wit:

“The instructions came through a Mr. Weiss, representing himself as Francisco Distributing Company. Mr. Weiss personally gave me those instructions. I held a conversation with Mr. Weiss covering the unloading of these cars. The conversation took place to the best of my knowledge at our office. The date of the conversation was on or about December 15, 1943. Nobody was present besides Mr. Weiss and myself.”

to which ruling of the court, counsel for the said defendant, Lawrence B. Goldsmith, then and there duly Excepted.

XVIII.

That the said District Court erred in admitting in evidence the following testimony of the said witness Sander with reference to the conversation referred to in the last assignment, to-wit:

“Q. What was the content of this conversation relating to those shipments?”

Counsel for the defendant Goldsmith objected to the question on the ground that it was incompetent, irrelevant and immaterial, hearsay, no part of the res gestae so far as the defendant Goldsmith was concerned; and not within the issues of the charge of conspiracy as far as the defendant Goldsmith was concerned, and asked the court that if the conversation was related, that the jury be instructed to disregard the statement as to the defendant Lawrence B. Goldsmith. The Court stated that it would not instruct the jury to disregard the statement, to which ruling of the Court counsel for the defendant Goldsmith duly Excepted. [198]

“(The Witness Continuing:)

Mr. Weiss came in to ask us if we could handle the cars or distribution for him, and after a little consultation about it in our distributing office we finally agreed to accept the car for him and distribute it and asked him to give us his address. He said he would arrange to have them down to us. I subsequently received certain orders from Mr.

Weiss. They are all together here in the file. This is the merchandise which was delivered ex car 1426 cases. When I refer to 'this car' I mean that car for which receipt was dated December 7, 1943. The number of that car was PRR 568,500."

XIX.

That the said District Court erred in admitting in evidence over the objection of the defendant Goldsmith, the testimony of the said Witness Sander as to statements made to the said Witness by the defendant Weiss out of the presence of the said defendant Goldsmith, and in stating, "The conversation of the defendant Weiss may be admitted as against both the defendants Goldsmith and Weiss," to which ruling of the Court, counsel for the defendant Goldsmith duly Excepted.

XX.

That the said District Court erred in admitting in evidence over the objection of counsel for the defendant Goldsmith that the same was incompetent, irrelevant and immaterial, and no foundation had been laid, a certain document, entitled "San Francisco Warehouse Company, 625 Third Street," dated, "San Francisco, December 17, 1943," for account of Francisco Distributing Company, Warehouse No. 6, PRR 568500, as U. S. Exhibit 9 being the record of the witness Sander, of the receipt of 650 cases of Old Mr. Boston Rocking Chair Whiskey, to which ruling counsel for the defendant Goldsmith duly Excepted. [199]

XXI.

That the said District Court erred in admitting in evidence over the objection of counsel for the defendant Goldsmith on the grounds stated in assignment XX, "U. S. Exhibit No. 9," which said exhibit was a document purported to represent the receipt of 650 cases of whiskey from Pennsylvania Railroad, Car PRR 568500, to which ruling, counsel for the defendant Goldsmith duly Excepted.

XXII.

That the said District Court erred in overruling the objection of counsel for the defendant Goldsmith to the following testimony given by the witness Sander upon the ground that the same was incompetent, irrelevant and immaterial, and called for the opinion and conclusion of the witness, and was hearsay as to the defendant Goldsmith:

"I can identify this sheaf of invoices now shown to me. These are car instructions which is headed Francisco Distributing Company, to deliver various lots of cased distilled spirits of Old Mr. Boston Rocking Chair to the respective people, customers of theirs, I presume, in the amount of 1426 cases."

XXIII.

That the said District Court erred in admitting in evidence over the objection of the defendant Goldsmith the following evidence, oral and documentary, during the testimony of the witness Sander:

"These papers were handed to me by Mr. Weiss at our office, 625 Third Street, San Francisco. We

did not have the cars in our possession. We had advised Mr. Weiss to pay the freight, surrender the bills of lading, so we could get the cars into the [200] warehouse. We subsequently got possession of the merchandise in these cars and made delivery of it in accordance with these documents."

Thereupon, the Court admitted the document (U. S. Exhibit 10) in evidence, to which ruling counsel for defendant Goldsmith duly Excepted.

XXIV.

That the said District Court erred during the direct examination of the witness Frank Dito, in admitting in evidence the following testimony, and in making the following rulings, to-wit:

"Q. Did Mr. Goldsmith visit the bank with reference to this transaction?"

Counsel for the defendant Goldsmith objected to the question upon the ground that it was leading and suggestive. The Court overruled the said objection, to which ruling counsel for the defendant Goldsmith duly Excepted.

"Mr. Colvin:

Q. What happened, Mr. Dito?

A. The draft was paid. Mr. Goldsmith directed that the draft should be paid. Mr. Goldsmith directed me that the draft named in Government's Exhibit No. 17 be paid. I had no dealings with Mr. Weiss during that period of time. Subsequent to that direction, the account of the Francisco Distributing Company was charged with the amounts

of the two drafts and the sight drafts were released to Mr. Goldsmith."

XXV.

That the said District Court erred in giving the [201] following instruction to the jury during the course of the examination of the witness Joseph N. Nathanson, as more fully appears from the record as follows, to-wit:

"The Court: I will instruct the jury at the present time that pursuant to the authority given to him by statute, the Price Administrator on May 22, 1943, promulgated an Order No. 5 in which he fixed the maximum prices for all sales by Ben Burke, Inc., Foster & Company, and American Distilling Company as follows: That on or after May 24, 1943, Ben Burke, Inc., Boston, Massachusetts, Foster & Company, New York City, and American Distilling Company, Beacon, Illinois, may sell and deliver to any person, and any person may buy and receive from those sellers, Old Mr. Boston Rocking Chair Whiskey, a blend of straight Bourbon whiskies, 80.6 proof, aged as above, at the following prices: \$19.24—that is not in issue; that is another kind of whiskey?

Mr. Colvin: That is for pints.

The Court: \$15.37 plus \$3.87, being the amount of the increased Federal excise tax of November 1, 1942, applicable thereto, or a total of \$19.24 per case of 12 bottles, each bottle containing one-fifth gallon of such whiskey.

Now, do you wish to take an exception to that?

Mr. Friedman: Yes, your Honor. I wish to object to what your Honor has told the jury, and I ask

your Honor to instruct the jury to disregard anything you have just read from the Federal Register [202] or advised them about, upon the following grounds:

First, that the purported order is only an order that regulates processors of these particular distilled spirits; it has nothing to do with wholesalers; it has nothing to do with people who buy from wholesalers or jobbers—that is the portion you have instructed the jury about—and therefore that this portion of the order is not binding upon Mr. Feigenbaum in this case, who is neither a processor nor a wholesaler of distilled spirits.

Secondly, upon the ground that the order on its face is in violation and in excess of the power conferred by the Emergency Price Control Act for these reasons: That under the Emergency Price Control Act the Administrator has the power by general order and by general order only to fix the prices of any commodity within a particular area or region, and that he has not the power and never was given the power by Congress to fix different prices for different people for the manufacture of the same kind of article, and this is a special order applicable only to certain people.

The Court: Do you propose to follow this up with further regulations with respect to the prices fixed for sale at wholesale?

Mr. Colvin: Yes, your Honor.

The Court: And this is preliminary to that?

Mr. Colvin: Yes, your Honor.

The Court: I will overrule the objection, and an exception may be noted.

Mr. Duane: If the Court please, in behalf of [203] the defendant Goldsmith I desire to offer the objection that this testimony and this regulation for this purpose is incompetent, irrelevant and immaterial. We are not here charged with any dealings with Burke or the American Distillery or anyone else.

The Court: I understand that.

Mr. Duane: We urge our objections on that ground.

The Court: I have instructed the jury as to that regulation and overrule the objection upon the statement of the District Attorney that it is preliminary to showing a further price regulation for sales by wholesalers. There may be some connection there. I can't see that that would do any harm.

Mr. Friedman: I would ask your Honor to limit this testimony so that it does not go in as against the defendant Feigenbaum, who is not within either of the categories mentioned by Mr. Colvin.

Mr. Riordan: Before the Court rules on that may I for the record, for the defendant Blumenthal adopt the objections made by Mr. Friedman and Mr. Duane, and object upon the further ground that it is an unlawful delegation of power in any event, also reiterating Mr. Friedman's objection particularly as to Mr. Blumenthal, that this is in no way binding upon the defendant Blumenthal as far as this evidence goes, because of the fact that there is no tie-in regarding any records here, every-

thing that has been introduced at this time concerning it, I realize your Honor has that in mind.

The Court: I will instruct the jury that the instructions as to this order of the Price Administrator [204] are now only being considered by the jury as against the defendant Goldsmith and if it is connected up with the other defendants it may be admitted later as to them.

Mr. Duane: May I, then, in behalf of the defendant Goldsmith, your Honor, make this further objection: that the order referred to an order promulgated by the Office of Price Administration, and the Price Administrator, is invalid and void, and that such order was adopted by the use of a delegation of power which of itself was invalid in this case.

The Court: That objection will be overruled and an exception noted.

Mr. Duane: Exception.

Mr. Riordan: Exception."

XXVI.

That the said District Court erred in permitting, upon the direct examination of the witness John Giometti, the introduction of the following evidence, and in making the following rulings, to-wit:

"Q. At that time, did you give any cash to Norman Reinburg?"

Counsel for the defendants Goldsmith, Abel and Feigenbaum objected to the question upon the ground that the evidence was not binding upon these said defendants. The court overruled the said

objection, to which ruling of the Court counsel for the defendants duly Excepted.

"The Witness: I gave him the balance of the \$65 a case.

(To the Court): \$2,025. [205]

"Subsequent to that time I had a conversation with Mr. Louis Abel regarding this transaction. I would say the conversation took place after I received the first shipment, I would say a couple of months after I received the whiskey previously. He had a jewelry store in front of Mr. Norman Reinburg's place. The conversation took place inside of the jewelry store. Beside Mr. Abel and myself, some fellow was present representing Hart's Distributing Company. That is a liquor company.

Mr. Colyin: Q. What was that conversation with Mr. Abel regarding your purchase of this whiskey?

Counsel for the defendants Goldsmith and Abel objected to the question, the former on the ground that it was incompetent, irrelevant and immaterial, and counsel for the defendant Abel objecting upon the same ground and upon the further ground that it was not within the issues of the subject-matter of the conspiracy charged in the indictment, for the reason that anything that the defendant Abel may have said, if it was subsequent to the conclusion of the transaction, would not be within the issues, and would not be competent or pertinent after the transaction had been concluded. The Court overruled the said objection, to which ruling counsel for the said defendants duly Excepted.

The Witness: He said he could get me some whiskey if I wanted to get it, and he said he could probably get it a little cheaper, and in that way—well, he would save me \$5 a case; \$60 a case, so I told him I paid \$65 a case for it once, and I wouldn't go for it again. That was all that was said. He said the whiskey I got at Francisco [206] Distributing Company went through his hands, and he could get me the same deal. He said he just took the money I gave Norman Reinburg, the money I gave to Norman Reinburg was given to him, and he took it to the "big shot," and he could get me the figure of \$60 a case, and I wouldn't go for it no more because I figured I was paying too much for it in the first place, and I didn't think I would get a legitimate bill. He did not say who the "big shot" was. He said the "big shot" was in San Francisco.

XVII.

That the said District Court erred in overruling the objection to testimony of defendant Goldsmith and admitting testimony, and denying the motion of defendant Goldsmith to strike out the testimony, all of the witness Victor Figone, as follows: Over the objection of defendant Goldsmith that no foundation therefor had been laid and that as to him the said matter was hearsay and was not connected with said defendant, the court permitted witness Victor Figone to testify:

"I purchased the whiskey from some gentleman in the Francisco Distributing. I understood that the man's name was Weiss."

The court denied the motion of defendant Goldsmith to strike out said testimony, said motion being made on the same grounds as the objection stated.

XVIII.

That the said District Court erred in overruling the objection to, and in denying the motion of counsel for the defendant Goldsmith to strike out the testimony of the [207] witness Milton Avila, on the ground it was hearsay, incompetent, irrelevant and immaterial. The full substance of which said testimony is as follows, to-wit:

"I have a tavern and restaurant, the Cerrito Club, in El Cerrito. The address is 448 San Pablo Avenue. I hold a liquor license at that place. During the months of December, 1943, or January, 1944, I purchased 75 cases of Old Mr. Boston Rocking Chair Whiskey. All my dealings were with Mr. Figone. I paid \$60 a case for the whiskey. That payment was by some odd \$1800 by check; the rest of it cash. I delivered that check [208] and cash to Mr. Figone. Subsequently I received the whiskey. A big dual truck came on January 3 and Vic helped me unload mine, and I helped him unload his. An invoice of that whiskey came by mail within the following week, some time, I don't remember exactly when, billed 'Francisco Distributing Company.' The check had been made payable to Francisco Distributing Company. I never went over to the Francisco Company."

to which ruling of the Court, counsel for the defendant Goldsmith duly Excepted.

XXIX.

That the said District Court erred during the examination in chief, of the witness James Cermusco, in admitting the following evidence and in making the following rulings, to-wit:

“Q. And what did you say to that?

Mr. Riordan: I object to this on the ground it is hearsay as to the defendant Blumenthal. It is completely hearsay as to him.

Mr. Duane: We also object on the ground it is hearsay as to the defendant Goldsmith, some unidentified person with whom this witness talked. Certainly such testimony is hearsay.

The Court: Is there any connection, counsel, between these checks and the account record of the Francisco Distributing Company?

Mr. Colvin: Oh, yes.

The Court: Do you propose to tie that in?

Mr. Colvin: I propose to tie that in and bring the actual account records of the Francisco Distributing [209] Company here, that is, their bank records which show the corresponding entries.

The Court: You wish this witness to testify as to a conversation with respect to these transactions in the whiskey?

Mr. Colvin: Yes, your Honor.

The Court: I will overrule the objection and you may have an exception, counsel.

Mr. Duane: Exception.

Mr. Friedman: I understand this is limited to the defendant Goldsmith.

The Court: To the defendant Francisco Distributing Company—to the defendant Goldsmith.

(The Witness, Continuing): Well, he says the San Francisco Warehouse. So we drove up the street, Third Street, and like I said, we stopped the car on Third Street between Mission and Market, and then from there we drove around and came back to Townsend Street, which the San Francisco Warehouse is right around the corner from Third Street, and then we went and seen that the whiskey was there, which it was, and from there on he said, 'Here is the bills for the whiskey,' and he wanted the money. So there we went back in the car, gave him the money, and he gave me the bill of ladings, I think they were, or bills of whiskey—I don't know what they were."

XXX.

That the said District Court erred in making the following ruling and in admitting the following testimony on the direct examination of the witness Walter J. Vogel, as the same appears of record:

"Q. Did you give any cash to this man, in addition to this check?"

Counsel for the defendant Goldsmith objected to the question upon the ground that no foundation had been laid. The Court overruled the said objection, to which ruling counsel for the defendant Goldsmith duly Excepted.

"The Witness: I did not give any cash at that time to this man when I gave him the check. After he brought me the bills, I gave him the cash. He

told me I would have to pay him for getting the whiskey. I think I gave him \$3,400 in cash."

XXXI.

That the said District Court erred in admitting in evidence over the objection of the defendant Goldsmith the following testimony of the Witness Francis Duffy:

"I gave this check (Government's Exhibit 48 for identification) to that man. The date of my first conversation with the man was about the third or fourth of December and took place at my place of business. I imagine the time of the conversation was in the early part of the afternoon, around 1:30."

Counsel for the defendants Feigenbaum, Blumenthal and Goldsmith, objected to the question upon the ground that the same was not binding upon any of said defendants and, the United States Attorney having stated that the testimony was offered particularly as to the defendant Goldsmith, but as to all of the defendants, the Court stated that the testimony would be admitted only as against the defendant Goldsmith, to which ruling counsel for the defendant Goldsmith duly Excepted. [211]

"(The Witness, Continuing): I have looked around and haven't been able to see this man in the court for two days now. He said to me, 'I understand you are interested in getting some liquor,' and I told him I was. And he told me, 'Well,' he says, 'I may be able to get you some.' So I said, 'Well, I would appreciate it very much, providing the

price didn't go too high.' So he said, 'I will be back and see you in a few days.' So he came back. At the time of this first conversation there was no mention made of the brand of whiskey at all. I told him I could take as high as 100 cases if I could get it. I did not give him any check on the first occasion. I did not have any other discussion with him on that first occasion. I had a conversation with him at a later time, after that first conversation on the 7th at my place of business. Nobody overheard the conversation at all. The first time the conversation took place around 1:30 in the afternoon. He came back again and said, 'Well, I think I have some liquor lined up.' I said, 'That's fine. How much is it going to cost me?' 'Well,' he said, 'it is \$24.50 a case is the price, but to make a certainty of getting the liquor, there will be a little premium.' I asked him how much the premium would be. So he said twenty dollars a case, so I said 'All right.' He said, 'Well, I will take a \$2,000 check now and when I come back again to give you the bill to get the whiskey out of the warehouse, you will have another check, \$450, and the additional \$2,000 in cash. He told me the additional money must be paid in cash. He did not say why it must be paid in cash. I had no further conversation with him at that time. The brand name hadn't been mentioned [212] yet. I understood it was to be fifths of whiskey. I knew it was going to be a blend of Bourbon whiskey. That is all. He said it was to be a blend of Bourbon whiskey. He said I would have it some time between the 17th and the first of the

year. He said he would be back to see me as soon as he had the bills to release the goods from the warehouse and everything straightened out. I had no more discussion with him whatsoever. I gave him the check for \$2,000 on the 7th. I did not see him write the name of the payee Francisco Distributing Company. He had not told me where the whiskey was coming from. The name of the payee was left blank. After the 7th of December I saw that man on the 17th in my place of business and had a conversation with him, at which nobody was present that overheard the conversation. He came and told me he had the warehouse release slip, and that he would pick up the check for \$450 and the additional money in cash. I had received no invoice as yet. That is all the conversation that I remember. Then I found out what kind of whiskey it was, and where it was billed through. He just told me it was Rocking Chair Whiskey, and I was to pick it up at the San Francisco Warehouse. He never made mention of the fact that the money was going through the Francisco Distributing Company. I have seen Francisco Distributing Company invoice No. 10081. It came into my possession in the mail a few days after I had picked up the merchandise on the 22nd of December, 1943. I went in a truck to the San Francisco Warehouse and picked up the whiskey there. The fellow and I who had the truck loaded it on the truck. The fellow with me was Vincent Markey. He ran our fruit and vegetable delivery service. I imagine the invoice came to me 3 or 4, maybe 5 days, after that [213] date. That was the first I saw the in-

voice. I have never seen this man since. On the 17th when I gave him this check for \$450 I gave him \$2,000 in cash. He didn't say anything about the ceiling price. I had no further transaction regarding this whiskey."

XXXII.

That the said District Court erred in admitting the following evidence and making the following rulings upon the direct examination of the witness Edward C. Harkins:

"I am special investigator for the Alcohol Tax Unit, working on the black market cases involving whiskey. My present office is Room 512 in the Custom House. I investigated this case with the assistance of others. I have had a conversation with Mr. Goldsmith regarding this case on several occasions. I was present early in January when Mr. Goldsmith and Mr. Weiss were together with special investigator Gaines. Mr. Gaines is a special investigator of the Alcohol Tax Unit. The conversation took place in the Empire Building, where we had our offices at that time. I believe there was an inspector by the name of Brunderol present. Inspector Wilson might have been present.

(To Mr. Friedman): The year is 1944.

Q. Was that conversation regarding this case?

Mr. Friedman: I object on behalf of the defendant Feigenbaum, as not binding upon him.

The Court: This testimony with reference to any conversation with the defendant Goldsmith, of

course it would not be admitted at the present time against the other defendants.

Mr. Dunne: As to the defendant Goldsmith, the [214] objection is that there has been no foundation laid, and no proof of any corpus delicti of the crime charged in the indictment.

The Court: I will overrule the objection. You may have an Exception.

(The Witness, Continuing): Special investigator Gaines was questioning both Mr. Weiss and Mr. Goldsmith regarding various shipments of whiskey. He asked them about these two carloads of Old Rocking Chair Whiskey, who purchased it, how it was handled. Mr. Weiss, I believe, did most of the talking. He said that his firm received \$2 a case for clearing it through their books. Mr. Goldsmith concurred in that. Mr. Goldsmith and Mr. Weiss both stated that they divided the \$2, each taking \$1.00. They both stated, agreed, that they did not sell any of the whiskey. It was sold by others, and they received the check generally for the payment of the whiskey in advance of the date that they had to take up the sight draft bills of lading. At that time they did not tell us who actually sold the whiskey. With relation to the disposition of these three carloads of whiskey, I think the conversation covered the import tax on this whiskey. After this conversation I had another conversation with Goldsmith regarding the facts of this case; early in September of 1944 in the State Building, San Francisco, was the next conversation.

Q. Who was present at the conversation?

Counsel for the defendant Goldsmith objected to the question upon the ground that the same was incompetent, irrelevant and immaterial and was after the conclusion of the alleged conspiracy in September, 1944, and also upon the ground that the corpus delicti had not been established. [215]

The Court overruled the objection, to which ruling counsel for the defendant Goldsmith then and there duly Excepted.

The Witness; Continuing: Special Investigator Koster of the State Board of Equalization and Mr. Goldsmith and myself were present. .

Mr. Colvin: Q. What was said relating to this case?

Mr. Dunne: The same objection, ruling and Exception, if your Honor please.

The Court: Very well.

(The Witness, Continuing): We questioned Mr. Goldsmith about who actually bought him the whiskey, who owned it, referring to these two carloads of Rocking Chair Whiskey. He said that Blumenthal brought it in; and when asked if he knew of his own knowledge, he said 'No.' We asked him what he received for his share of it, and he said the Francisco Distributing Company received \$2 per case, of which \$2 he gave Weiss half, gave Weiss \$1. There was a little other question, but it was quite a short interview at that time. I did not show Mr. Goldsmith any documents at that time. I think that is the essential part of the conversation as to Mr. Goldsmith. After that time we had a conversation with the defendant Goldsmith at the Of-

fice of the Alcohol Tax Unit on September 13, 1944. Mr. Goldsmith and his attorney, Mr. Duane, and, I believe, Mr. Roy Johnson, of the Alcohol Tax Unit, and myself, were present.

Mr. Dunne: Same objection.

Mr. Friedman: Same limitation, your Honor.

The Court: Same limitation, same exception noted by counsel for Mr. Goldsmith. [216]

(The Witness, Continuing): Mr. Goldsmith was further questioned about these two shipments of two earloads of Rocking Chair Whiskey, and at that time I showed him several invoices that I had in my possession. Government's for Identification No. 22, Francisco invoice to The Brig was in my possession then and there, and I showed that document to Mr. Goldsmith. I asked him who wrote this one, and he identified it as being in his handwriting and that he wrote it. Government's Exhibit No. 52, Francisco invoice to Fingerhut, was in my possession then and there, and I showed that document to Mr. Goldsmith. I asked him who wrote this, and he said that he wrote it. Except, he said, he did not make the notations of the \$2,000. He said he didn't know who made that. I referred to the notation, "Received on account \$2,000. Balance due \$450."

The document now shown me, Government's No. 58 for identification, Francisco invoice to Travis, I showed that document to Mr. Goldsmith. He identified that document as being in his handwriting, all but the notation likewise on this. He said he didn't know who wrote that. I showed Mr. Gold-

smith various other documents. He identified a number of invoices that he wrote. He stated that he wrote most of the invoices, that a few were written by his bookkeeper. On that occasion, I had other conversations with him relating to these two carloads. We again asked him about the deal and we got the same answer that they received \$2 per case, and he stated at that time, I believe, that up to July 1, 1943, Mr. Weiss had been his partner, or on two occasions, I believe, he made the same statement, and that subsequent to July 1, Mr. Weiss was the sales manager but that he felt he was entitled to half the profits, and he [217] divided the profits with him, including the \$2 per case received on this Rocking Chair Whiskey. I did not have any later conversation than the one in which these documents were identified with Mr. Goldsmith."

XXXIII.

That the said District Court erred in granting the motion of the United States Attorney at the conclusion of the trial that all testimony and all exhibits be admitted as against all the defendants and in overruling the specific objections and denying the several motions of counsel to strike the testimony of certain witnesses from the record, all of which from the record and proceedings herein, fully and at large appears, to which said order granting said motion of the said United States Attorney, and to which said order overruling the objections of counsel to the admission of said testimony, and denying the motions to strike out the said evidence

and the said testimony admitted, as aforesaid, upon said motion of the United States Attorney, counsel for the defendant Goldsmith then and there duly Excepted.

XXXIV.

That the said District Court erred in giving the following instruction to the jury:

"In every crime, there must exist a union or joint operation of act and intent, and for conviction, both elements must be proved to a moral certainty and beyond a reasonable doubt. Such intent is merely the purpose or willingness to commit such an act; it does not require any knowledge that such act is a violation of the law. However, a person is presumed [218] to intend to do all that he voluntarily and willfully does, in fact, do, and must be presumed to intend all the natural, probable and usual consequences of all his own acts."

to which instruction counsel for the defendant Goldsmith duly Excepted.

XXXV.

That the said District Court erred in giving the following instruction to the jury, to which counsel for the defendant Goldsmith duly Excepted:

"In the course of a trial, as in this case, which has run a number of days and several hundred pages of transcript as I understand, you may find some discrepancies, or inconsistencies in the transcript of a witness, or perhaps between the testimony of different witnesses. If such discrepancies or inconsistencies are not material, and they do not

affect the true issues of this case, and if they do not reasonably bear upon the guilt or innocence of the defendants, or any of them, do not waste your time in considering them."

XXXVI. \

That the said District Court erred in giving the following instruction to the jury, to which counsel for the defendant Goldsmith duly Excepted:

"To constitute a conspiracy, it is not necessary that two or more persons should enter into an express agreement for the unlawful venture or scheme, or that they should directly state between themselves, or otherwise, [219] what the unlawful plan or scheme is to be or the details thereof, or the means by which the unlawful combination is to be made effective. It is sufficient that two or more persons, in any manner, positively or tacitly come to a mutual understanding to accomplish an unlawful design. In other words, when an unlawful end is sought to be effected, and two or more persons, actuated by the common purpose of accomplishing that end, work together in any way in furtherance of the unlawful scheme, everyone of such persons becomes a member of the conspiracy."

XXXVII.

That the said District Court erred in giving the following instruction to the jury to which counsel for the defendant Goldsmith duly Excepted:

"Each party must be actuated by an intent to promote the common design. If persons pursue by their acts, the same unlawful object, one performing

one act and a second another act, all with a view to the attainment of the object they are pursuing, the conclusion is warranted that they are engaged in a conspiracy to effect that object. Cooperation in some form must be shown. There must be an intentional participation in the transaction with a view and purpose to further the common design, and if a person, understanding the unlawful character of a transaction, encourages, advises or, in any manner, with a purpose to forward the enterprise or scheme, assists in its prosecution, he becomes a conspirator. And so, a new party coming into a conspiracy after its inception, with a knowledge of its purposes and objects, and with an intent to promote the same [220] becomes a party to all of the acts done before his introduction into the unlawful combination, as well as to the acts done afterwards. Joint assent and joint participation in the conspiracy may be found, like any other fact, as an inference from facts proved."

XXXVIII.

That the said District Court erred in giving to the jury the following instruction, to which counsel for the defendant Goldsmith duly Excepted:

"In this case, as I have already told you, there are five defendants. Having in mind all the instructions and rules of law that I have given to you, you may find all the defendants guilty, or all the defendants either guilty or not guilty, in accordance with the rules and statements as to the law that I have given you."

XXXIX.

That the said District Court erred in giving to the jury the following instruction, to which counsel for defendant Goldsmith duly excepted:

“It is not necessary that it be shown that any person concerned in the alleged conspiracy profited by the things he did, but if any of the defendants, with knowledge that the law was designed to be violated in the particular manner charged in the indictment, aided in any way by affirmative act in the accomplishment of the unlawful act, they would be guilty. To this statement there is but one exception, and that is, if before any overt act has been committed on the part of any conspirator or at his suggestion or with his aid or participation, any such conspirator withdraws from [221] the conspiracy and wholly disassociates himself from the project, or the carrying out thereof, he ceases to be a conspirator and is without guilt.”

XL.

The court erred in denying the motion of the defendant Goldsmith, made at the conclusion of all of the evidence in the case, to strike out all testimony of all acts and declarations of any person not made in the presence or with the knowledge or with the consent of defendant Goldsmith, upon the ground that it was incompetent, irrelevant and immaterial, was as to said defendant hearsay, and was without foundation in that there was no other or independent proof of the connection of said defendant with any alleged conspiracy, being a motion made by

said defendant in connection with his objection to the admission in evidence against him of all evidence offered and received as against other defendants and being made upon the same grounds as said defendant's objection to the Government's said motion, all as more particularly appears by Assignment VIII, to which reference is hereby made.

Wherefore, the said defendant Lawrence B. Goldsmith prays that the aforesaid judgment of said District Court be reversed, and that this defendant go hence sine die.

Dated: July 23rd, 1945.

(Signed) ARTHUR B. DUNNE,

(Signed) WALTER H. DUANE,

Attorneys for Defendant and Appellant, Lawrence B. Goldsmith.

(Acknowledgment of Service.)

[Endorsed]: Filed July 23, 1945. [222]

[Title of Court and Cause.]

DEFENDANTS' BILL OF EXCEPTIONS

Be It Remembered:

That this cause came on regularly for trial the 15th day of May, 1945, in the Southern Division of the United States District Court in and for the Northern District of California, before Honorable Louis E. Goodman, United States District Judge, Frank J. Hennessy, Esq., United States Attorney, by Reynold H. Colvin, Esq., and James T. Davis,

Esq., Assistant United States Attorneys, appearing as counsel for the United States of America, Morris Oppenheim, Esq., and Thomas J. Riordan, Esq., appearing as counsel for the defendant Harry Blumenthal, Harry K. Wolff and Sol Abrams, appearing as counsel for the defendant Louis Abel, Arthur B. Dunne, Esq., and Walter H. Duane, Esq., appearing as counsel for the defendant Lawrence B. Goldsmith, Leo R. Friedman, Esq., appearing as counsel for the defendant Albert Feigenbaum, and the defendant Samuel S. Weiss appearing in his own proper person.

Thereupon a jury was duly impaneled and sworn to try the cause, and was duly charged with the deliverance of said defendants, whereupon the following proceedings, and none other, were taken and had: Reynold H. Colvin, Esq., Assistant United States Attorney, made the following [225] opening statement on behalf of the Government:

“The conspiracy charged here is conspiracy to sell certain cases of Old Mr. Boston Rocking Chair Whiskey at a price above the ceiling price. The evidence of the Government will indicate that there were two carloads of Old Mr. Boston Rocking Chair Whiskey brought in from the East. All in all, there were 4040 cases in these two carloads. Now, in presenting this matter to you the Government will trace the purchase and shipment of these carloads from the East through the records of the Alcohol Tax Unit, through the freight company, through the warehouse company, and through the bank which collected for the sight drafts in this case.

"So far as the records of the bank are concerned, they will show that the money was paid from the account of the Francisco Distributing Company. And that brings us to the question of the defendants, the particular defendants, and who they are. The defendant who was the licensee, who held the wholesale liquor license for the Francisco Distributing Company was Mr. Goldsmith. He held that license all during the months of December, 1943 and January, 1944, when the sales of this whisky from wholesaler to retailer took place. And Mr. Weiss was an employee of Mr. Goldsmith and the Francisco Distributing Company during this period. He acted as salesman for that company and as an employee, and a close associate of Mr. Goldsmith. The evidence will show that the profit to Goldsmith and Weiss for bringing in this whisky was \$2, which was split evenly among them as to each case—in other words, \$4040 for Goldsmith and \$4040 for Weiss.

"The bank records will indicate that the purchase price [226] of this whisky was in excess of \$78,000, or a little less than \$20 per case.

"Now we move on to the other aspect of the case, the question of the sale of the whisky. First we might note that Mr. Nathanson, of the Office of Price Administration, will testify as to the ceiling price of this whisky, \$25.24 per case. Now, there is in this case a series of invoices which will be presented to you as jurors. Some of these invoices were made out by Mr. Goldsmith. Some of them by an employee of the Francisco Distributing Company other than Mr. Goldsmith. Each of those invoices sets the price

on the whiskey at \$24.50 per case, some 75 cents lower than the actual maximum ceiling price.

"The evidence will show that those invoices were a mere facade, a front for these transactions, because in each of the transactions where there is an invoice for \$24.50, the Government will prove that in addition to the amount shown by the invoice there was a cash payment, not of record, of anywhere from \$25 to \$35 per case, and in one or two instances \$40 per case. So far as the price violation, then, the evidence of the Government will be that while the whisky was billed at \$24.50 per case, it was sold at prices between \$55 per case and \$65 per case.

"Now, what was the participation of these other defendants in the case? First there is Mr. Blumenthal. During these activities Mr. Blumenthal operated a sporting goods store on Third Street between Mission and Market. He actually made sales of this whisky above the ceiling price. He was referred to, as the evidence will show, by one of the other defendants as the 'Big Shot.' The money passed through his hands. He received checks made out to the [227] Francisco Distributing Company. And while we are speaking of checks, it might be noted that we have exactly the same situation, as the evidence will indicate, as to the checks that were added to the invoice. In each case that we will bring forward here the check will be for an amount which is a multiple of \$24.50. In those instances, which we will show you where there was a sale of 100 cases of whisky, the check is made out to the Francisco Distributing Company in the amount of \$2450, which

would be within the ceiling price. But the evidence will show that the check is the same type of purported transaction as the invoice. It matches the invoice. But that in addition to the check there was in each instance which we shall bring forward a cash payment.

"Now, Mr. Feigenbaum, another of the defendants, as you probably heard here, operates a drug store, did operate a drug store, but in the Mission. He held at those premises a retail liquor license and was engaged in that business there apparently in connection with the drug business. But he did make a sale of some 100 cases of whisky where the ceiling price was violated, and the evidence will indicate that in that instance the sales price was approximately \$65 per case.

"Mr. Abel, the fifth of the defendants whom I have mentioned, operated a loan office in the City of Vallejo. All of the sales that we know of made by Mr. Abel were sold to people living in Vallejo, to people who operated taverns there. In each of those cases again there was the purported legitimate transaction, the invoice which these tavern owners received from the San Francisco Distributing Company for \$24.50 per case, and the check made out to the Francisco Distributing Company for \$24.50 per case. But [228] the evidence will show, when these tavern owners come and testify before you, that in each of those cases there was a silent factor added to the \$24.50 purportedly legitimate transaction; in each of those cases there was a cash overpayment on the ceiling price.

"I think that that outlines for you the case as the Government will present it."

Thereupon counsel for each and all of the defendants reserved their opening statements.

ALMON C. JONES,

called as a witness by the Government, and having been first duly sworn to testify to the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination

By Mr. Colvin:

I am in the United States Internal Revenue Service, Alcohol Tax Unit. My designation is that of chief bonded accounts division. My division supervises the issuance of basic permits and the receiving of reports from the various proprietors of liquor production plants, bonded wineries, breweries, wholesale dealers, and so forth, for what is known as the 14th District, consisting of California, Arizona, Nevada and Hawaii. I appeared here in court pursuant to a subpoena from the Clerk of the District Court, and I was instructed to bring with me certain documents and among those documents was the license of the Francisco Distributing Company. Pursuant to that subpoena, I brought this file [229] which you now show me. I have in this file Wholesale Liquor Dealers' Basic Permit issued to the Francisco Distributing Company, operated by L. B. Goldsmith, which was in effect during No-

(Testimony of Almon C. Jones.)

vember and December of 1943, up to and including January of 1944. It, however, is not a license. It is a basic permit. The license of the Francisco Distributing Company is in the name of Lawrence B. Goldsmith.

Thereupon the said Wholesaler's Basic Permit was offered in evidence by the Government, and was received in evidence and marked U. S. Exhibit 1, and was read to the jury. The said document is in the words and figures following, to-wit:

"Form 1633

Treasury Department

Internal Revenue Service

July 1940

Amended Permit No. 14-P-91 (To show withdrawal of SS Weiss from the partnership)

WHOLESALE'S BASIC PERMIT

(Under the Federal Alcohol Administration Act
and Regulations)

L. B. Goldsmith, dba Francisco Distributing Co.
122 Tenth Street,
San Francisco, California.

Pursuant to application dated June 9, 1943, you are hereby authorized and permitted to engage, at the above address and at branch offices and other places of business, in the business of purchasing for resale at wholesale distilled spirits and wine, and, while so engaged, to sell, offer and deliver for

(Testimony of Almon C. Jones.)

sale, contract to sell and ship, in interstate and foreign commerce, the alcoholic beverages so purchased.

This permit is conditioned upon compliance by you with sections 5 and 6 of the Federal Alcohol Administration Act, and all other provisions thereof; the Twenty-first [230] Amendment and laws relating to the enforcement thereof; all laws of the United States relating to distilled spirits, wine, and malt beverages, including taxes with respect thereto; all applicable regulations made pursuant to law which are now, or may hereafter be, in force; and the laws of all States in which you engage in business.

This basic permit is effective from the date hereof and will remain in force until suspended, revoked, annulled, voluntarily surrendered, or automatically terminated, as provided by law and regulations.

This permit is not transferable.

J. H. MALONEY

District Supervisor,

By Q. J. BOONE

Acting District Supervisor.

U. S. Government Printing Office 10-18480

(The permittee agree, by accepting this amended permit, that issuance thereof shall not relieve him of any liability heretofore incurred.)

(Testimony of Almon C. Jones.)

The Witness: (Continuing)

I was instructed by the terms of that subpoena to bring with me the wholesale basic permits in effect during November and December 1943 and January of 1944, of Samuel S. Weiss, Louis Abel, Albert Feigenbaum and Harry Blumenthal. I have not brought any such basic permits with me because an examination of the files of the alcohol tax units indicates no such permits existed. My department has on file under my direction and supervision certain forms known as the 52-A forms. Fifty-two-A form used by the alcohol tax unit is the form on which the wholesale liquor dealers report the detailed receipt of merchandise. 52-B form is a counterpart of 52-A on which the dealer reports the disposition of merchandise. [231]

"U. S. Exhibit 2" for identification, a document entitled "Wholesale Liquor Dealer's Monthly Report, summary of forms 52-A and 52-B," is one of the documents I brought with me pursuant to the subpoena served upon me. The document shows the purchases of the Francisco Distributing Company during the month of December of 1943, as kept in my records.

Thereupon counsel for the Government offered the said document in evidence.

Counsel for defendant Blumenthal objected to the introduction of the said document in evidence upon the ground that no proper foundation had been laid and that the same was incompetent, irrelevant and immaterial. Counsel for the defendant

(Testimony of Almon C. Jones.)

Goldsmith objected on the ground that the same was incompetent, irrelevant and immaterial, and had nothing to do with the issues in the case, and that any purchases of any commodity made by the defendant Goldsmith or the Francisco Distributing Company were not in issue. Counsel for the defendant Blumenthal further objected upon the ground that the said exhibit was hearsay and irrelevant as to the defendant Blumenthal, and that, unless the said defendant was implemented into the conspiracy, the Government had no right to introduce the said evidence against the said defendant Blumenthal. Counsel for the defendant Feigenbaum objected to the introduction of the said document in evidence as to the defendant Feigenbaum, upon the ground that the same was incompetent, irrelevant and immaterial, in that it purported to be certain transactions between the defendant Goldsmith and the alcohol tax unit, to which defendant Feigenbaum was not a party and of which he had no notice, and that the said transactions were done out of his presence and without his knowledge and were not binding upon him; and upon the further ground that the same was hearsay as to [232] the defendant Feigenbaum and did not establish that the liquor was bought or sold or acquired as against anybody except the person who made the declaration, and if the question of the acquisition and sale of the said liquor was involved, so far as the defendant Feigenbaum was concerned, the said document was not the best evidence and was hearsay and not binding upon

(Testimony of Almon C. Jones.)

the said defendant. Counsel for the defendant Goldsmith made the further objection that the charge in the indictment concerned a conspiracy in this district, and the sale of certain liquor in this district, and that any records with reference to the purchase of liquor by the distributing company had nothing to do with the matter, and that the court was concerned with the conspiracy, not where the liquor came from, who gave it, or who bought it, and that the liquor was in this jurisdiction, and was sold in this jurisdiction.

The court overruled each and every one of the said objections, to which counsel for each of the said defendants then and there duly excepted.

Thereupon counsel for the defendant Abel suggested that all objections made and exceptions noted should run in favor of all of the defendants, with the right to move to strike thereafter; and the court then and there ordered that the record so show.

Thereupon the document last referred to; to-wit, "U. S. Exhibit 2 for Identification", was received in evidence as U. S. Exhibit 2.

The Witness: (Continuing)

I am familiar with the document marked Government's Exhibit No. 3 for Identification, entitled "Wholesale [233] Liquor Dealer's Monthly Report, Summary of Forms 52-A and 52-B," bearing the date "Month of January 1944." That document was brought with me pursuant to the subpoena served upon me, and is kept under my direction and supervision as one of the duties of my

(Testimony of Almon C. Jones.)

employment with the bonded account section of the alcohol tax unit.

Thereupon U. S. Exhibit 3 was received in evidence, subject to the objections of all of the defendants made to Exhibit 2, and subject to the exceptions of all of said defendants.

The Witness: (Continuing) I have under my supervision and direction the 52-A and 52-B records of the Francisco Distributing Company which had been filed through the months March 1942 to the month of December 1943. I have access to these forms.

Thereupon U. S. Exhibits 4, 5 and 6 were admitted in evidence for the limited purpose of showing that there were no sales of the particular whiskey mentioned in the indictment covered by the said reports, to the introduction of which counsel for the defendants objected upon the ground that the same were incompetent, irrelevant and immaterial and no part of the *res gestae*, and that there was no foundation laid for the introduction thereof, and that, so far as the defendant Feigenbaum was concerned, there was no proof to show he made the returns. All of said objections of counsel for each of the said defendants were overruled by the court, to which ruling counsel for each of said defendants duly excepted, and said exceptions were noted by the court.

Cross-Examination

By Mr. Weiss:

It is not required that salesmen hold a basic per-

(Testimony of Almon C. Jones.)

mit. It would be permissible for you to sell liquor for somebody else, for some permittee, without a basic permit. [234]

ROBERT OTIS GRUBBS

called as a witness on behalf of the Government, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Colvin:

I am known as Chief Claims Clerk, Santa Fe Railroad, San Francisco. I have seniority back to 1911, but I have worked for them several times before that. It dates back as far as 1902. I have held this particular position since 1919. I appear here under subpoena from the Clerk of the District Court. That subpoena directed me to bring with me certain freight bills. I have them with me.

Thereupon, a freight bill produced by the witness was marked U. S. Exhibit 7 for identification. Another bill of lading was marked U. S. Exhibit 8 for identification. The witness testified: Those two freight bills are kept as a permanent office file pursuant to the conduct of the Santa Fe's business. The documents now shown me are copies of the original records No. 7 and No. 8. Thereupon, U. S. Exhibits 7 and 8 for identification were received in evidence.

Cross-Examination

By Mr. Friedman:

I did not see the cars this whiskey was in.

Thereupon, counsel for the defendant Blumenthal moved to strike out all the evidence of the witness as being incompetent, irrelevant and immaterial and not binding on the defendant Blumenthal. The court denied the motion, to which ruling of the court, counsel for the defendant Blumenthal duly excepted.

FRED H. SANDER,

called as a witness by the Government, and having been first duly sworn, testified as follows: [235]

I am Division Manager of the Liquor Department, San Francisco Warehouse Company, and have been so employed fifteen years. I supervise the handling and distribution of distilled spirits. I am here pursuant to a subpoena by which I was instructed to bring with me certain documents. I was

uired to bring with me certain records of the receipt and unloading of two railroad cars. I have those records with me. I have with me the records of the receipt of the two railroad cars. The first is a receipt of a car PRR 568500; the second is a car B & O 174149. The records of receipts are on separate sheets of paper. This is the record of receipts here. There has been a division of this stuff; part of it went ex car and the balance went into the warehouse for further distribution at a later date. These documents stapled together represent the receipts of 650 cases in the warehouse, and this was distributed at a later date ex this car PRR 568500. This here is the evidence of deliveries ex that same car of 1426 cases. That is the record of

(Testimony of Fred A. Sander.)

deliveries that I spoke of. This document is the record of receipts of 650 cases. The rest of it was delivered and that remained. I have brought with me a record of receipts of the second car. I don't have a record of the receipts of the balance of that portion which was delivered. That portion was delivered from the car under orders from the Francisco Distributing Company. It didn't go into the warehouse. 1426 cases were delivered ex car. By "ex car" I mean delivered right from the car on arrival. 1426 cases were delivered right from the car on arrival. Thereupon counsel for the defendant Goldsmith moved that the last statement of the witness be stricken out on the ground that it was incompetent, irrelevant and immaterial hearsay, and that there was no foundation laid for it. The court denied the motion; to which counsel for all the defendants duly excepted. [236]

Mr. Colvin: Q. Mr. Sander, who, is anyone, instructed you regarding the unloading of the two freight cars whose numbers appear in your records?

Counsel for the defendant Goldsmith objected to the question upon the ground that it was incompetent, irrelevant and immaterial and assumed something not in evidence. The court overruled the objection, to which ruling counsel for all the defendants duly excepted.

The Witness: (Continuing) The instructions came through a Mr. Weiss, representing himself as the Francisco Distributing Company. Mr. Weiss

(Testimony of Fred A. Sander.)

personally gave me those instructions. I see Mr. Weiss here in the court room; the gentleman with the bluish grey suit and light brown—the second man from the front or far side of the counsel table. I held a conversation with Mr. Weiss covering the unloading of these cars. (To Mr. Friedman): The conversation took place, to the best of my knowledge, at our office. The date of the conversation was on or about December 15, 1943. Nobody was present beside Mr. Weiss and myself.

Q. What was the content of this conversation relating to those shipments?

Counsel for the defendant Blumenthal objected to the question on the ground that it was incompetent, irrelevant and immaterial hearsay, no part of the res gestae so far as the defendant Blumenthal was concerned, and not within the issues of the charge of conspiracy as far as the defendant Blumenthal was concerned, and asked the court that if the conversation was related, that the jury be instructed to disregard the statement as to the witness Blumenthal. The court stated that it would not instruct the jury to disregard the statement to which ruling of the court counsel for the defendant Blumenthal duly excepted. [237]

Counsel for the defendant Abel objected to the question upon the ground that the same was hearsay and a like objection was made by counsel for the defendant Feigenbaum. The court overruled the said objections, to which ruling of the court counsel for the said defendants severally excepted.

(Testimony of Fred A. Sander.)

The Witness: (Continuing) Mr. Weiss came in to ask us if we could handle the cars or distribution for him, and after a little consultation about it in our distribution office, we finally agreed to accept the car for him and distribute it and asked him to give us his address. He said he would arrange to have them down to us. I subsequently received certain orders from Mr. Weiss. These are all dated December 17, 1943, so I presume it was on that day. I have here certain orders. They are all together here in the file. This is the merchandise which was delivered ex car 1426 cases. When I refer to "this car", I mean that car for which receipt was dated December 17, 1943. The number of that car was PRR 568500. These documents, the records of receipts and the others received by me from Mr. Weiss have been in our files as part of our records since that time. Thereupon, counsel for the Government offered the said documents in evidence.

The Court: Before we proceed with the testimony of this witness, I think it in order that each defendant here, in some cases having more than one attorney, and a number of attorneys involved, it will probably save time for all concerned if we make a different ruling in connection with the admission of testimony. It is probably fairer for the Government to assume the burden in that regard, and therefore the Court will change the ruling heretofore made in connection with the testimony of the witness Jones, and the testimony of the wit-

(Testimony of Fred A. Sander.)

ness Jones, together with the exhibits offered in connection with his testimony, will be admitted in evidence only as [238] against Goldsmith, and then whenever the Government deems it appropriate, it may move to admit that testimony as to all the defendants. I suggest that Mr. Davis keep a record of the different witnesses in that regard and whenever the Government feels that evidence, if that time does arrive, may be admitted as to all the defendants, it may make an appropriate motion to that effect. As the testimony is presented, the court will admit it as to the defendants against whom it appears to be pertinent at the time. It will be up to the Government at the time to admit it as to all the defendants, or so many of them as the Government feels it applies to. Now, as to the witness Grubbs, the testimony so far presented may apply to the defendant Goldsmith. Of course, the conversation of the defendant Weiss may be admitted as against both the defendants Goldsmith and Weiss.

To this ruling of the court, counsel for the defendant Goldsmith duly excepted.

The court stated that so far as the testimony of the witness on the stand pertained to the conversation with the defendant Weiss, it was admitted only as to the defendant Weiss.

The Witness: (Continuing) I can identify this document entitled "San Francisco Warehouse Company, 625 Third Street", dated San Francisco, December 17, 1943, "For Account of Francisco Distributing Company Warehouse #6, PRR

(Testimony of Fred A. Sander.)

568500" as being my record of the receipt of 650 cases of Old Boston Rocking Chair Whiskey at the date stated.

Thereupon, counsel for the Government offered the document in evidence as Government's Exhibit next in order. [239]

Counsel for the defendant Goldsmith objected to the introduction of the said document upon the ground that it was self-serving, that no proper foundation had been laid for it, and that it was not binding upon any of the defendants.

The Witness (Continuing): I had no dealings whatsoever with the witness Goldsmith. I had dealings with Mr. Weiss and those dealings regarded Pennsylvania Railroad car PRR 568500. That car was received by my warehouse company. This document shown to me represents the record of the receipt of 650 cases from that car. Thereupon, counsel for the Government offered the said document in evidence. Counsel for the defendant Goldsmith objected upon the ground that it was incompetent, irrelevant and immaterial. The court overruled the objection, to which ruling counsel for the defendant Goldsmith duly excepted. The document was marked U. S. Exhibit 9 in evidence. The court stated that the document was admitted in evidence against the defendant Weiss.

The Witness: (Continuing) I can identify this sheaf of invoices now shown to me. These are car instructions which is headed "Francisco Distributing Company" to deliver various lots of cased

(Testimony of Fred A. Sander.)

distilled spirits called Old Mr. Boston Rocking Chair to the respective people, customers of theirs, I presume, in the amount of 1426 cases.

Counsel for the defendant Goldsmith objected to this testimony upon the ground that it was incompetent, irrelevant and immaterial and called for the opinion and conclusion of the witness and was hearsay as to the defendant Goldsmith.

The Witness: (Continuing).

The Court: Where did you get these papers?

The Witness: These papers were handed to me by Mr. Weiss at our office, 625 Third Street, San Francisco. [240] We did not have the cars in our possession. We had advised Mr. Weiss to arrange to pay the freight, surrender the bills of lading to the Railroad so we could get the cars into the warehouse. We subsequently got possession of the merchandise in these cars and made delivery of it in accordance with these documents. Thereupon, the Court admitted the document in evidence, to which ruling of the Court counsel for the defendants Goldsmith and Blumenthal duly excepted. The document was marked U. S. Exhibit 10 in evidence.

The Witness (Continuing): The sheaf of invoices entitled "Francisco Distributing Company, 122 Tenth Street," came into my personal possession on or about December 17, 1943. These were received from Mr. Weiss by me at our office and have since been in my records and files. The documents were marked U. S. Exhibit 11 in evidence.

The Witness: (Continuing) There is (sic) in

(Testimony of Fred A. Sander.)

my hands here, five in number, which we call delivery orders, comprising a form of invoice which reads "San Francisco Distributing Company", with an order number—the invoice order number—and it discloses thereon "Francis E. Duffy", as an example.

After discussion with counsel, the Court stated that the document would be admitted in evidence as against the defendant Weiss, and that the ruling would also apply to Exhibit 10.

The Witness: (Continuing) My warehouse company received Car B & O 170144. I have a record of the receipt of that car. The document shown me is that record. That car was received pursuant to an arrangement with Mr. Weiss. I had a conversation with Mr. Weiss regarding the receipt of that car. That conversation took place at our office on or about December 31, 1943. Beside Mr. Weiss and myself, the usual [241] office staff were present. I dealt with Mr. Weiss at the time myself.

Q. What was the content of that conversation with reference to the car which we have mentioned by number? Counsel for the defendant Blumenthal objected to the question and the Court stated that the evidence was admitted as against the defendant Weiss.

(The Witness, Continuing): He came in and asked us if we could handle another car of whiskey for him, and I questioned it at the time, and later on I finally decided to take it on for him, and he finally came in with these documents as to the dis-

(Testimony of Fred A. Sander.)

tribution. This first document represents the record of the carload by me and has been kept as part of my record. A total of 1964 cases were received as part of that shipment. It consisted of cases of fifths, Old Rocking Chair Whiskey. The document was admitted against defendant Weiss and marked U. S. Exhibit 12 in evidence.

The Witness: I have here a sheet of invoices which came into my possession on or about January 3, 1943. I received these invoices from Mr. Weiss. He presented these invoices to me with instructions to get the merchandise shipped as soon as possible on arrival of the car. That conversation took place at our office. At that time, the carload had not arrived. I think there is a letter in there. We addressed a letter to the Santa Fe Railroad Company December 31, 1943. That means we received the car on or about January 3, 1944.

(To the Court): This represents the Francisco Distributing Company's order to deliver a record of the serial numbers that were filled on each order, a copy of the carrier bill of lading on which the merchandise moved to the customer's place of business. I delivered all this merchandise in accordance with these documents that I have here. These were all [242] records kept by my office, and they all relate to the cases of whiskey in the B & O car 174149.

The Court admitted the documents in evidence as against the defendant Weiss, and they were marked U. S. Exhibit 13.

(Testimony of Fred A. Sander.)

(The Witness, Continuing): This is a part of that same deal wherein it is delivered from the car—this is stock delivered from the same car out of our warehouse. These invoices regard B & O car 174149, and they are part of the same transaction and the record kept by my firm, and they supplement the Government's Exhibit 13 which I just identified. They are part of the same transaction, the same car. That is our method of handling records. On one set of records we kept actual deliveries from rail cars and the other set of records are kept from actual deliveries taken from rail cars, and then future deliveries made from that stock. That last group of papers refers to an additional group of shipments than those contained in the last exhibit.

Mr. Weiss: Your Honor, at this time, I would like to say I never gave him those. I am willing to have bills that I gave him admitted, but those I do not know anything about I would rather object to their admission.

The Court: Well, in the form you make the objection, I will overrule it. I do not know what you are getting at. You may have an exception to the Court's ruling.

The Witness: This is—we will take this as an example—an order for the entire operation for the distribution of that car. It reads "Deliver to Dillon's," with a certain address, and an order number which reads—these are delivery orders, our instruction to deliver merchandise. This here attached is a report of the serial numbers of each case that went

(Testimony of Fred A. Sander.)

out on this order. The first pink document on [243] top is the delivery order given to me by Mr. Weiss. Before deliveries of case whiskey can be made, we are required to take the number off—a record of the number off each case and report it to the actual owner of the merchandise. The first is an order for my company to do certain things with the merchandise. The second sheet attached to the order is a list of the numbers of the particular merchandise I allocated to that order. This is a copy of the bill of lading on which the shipment was made. Our shipment to the customer that is represented on this order, that is a regular commercial document made up by all transportation people. It is the document of my own company. The next paper, as I stated before, is another order, the procedure of which is like the first one, I just—the rest of them are just duplicates of the first, referring to different points of delivery and different cases of whiskey. We make up bills of lading on all cases of distilled spirits moving out of our warehouse, whether city deliveries or shipments. Thereupon, counsel for the Government offered the document in evidence, to which counsel for the defendant Goldsmith objected upon the ground that it was incompetent, irrelevant and immaterial, self-serving and not binding upon the defendant Goldsmith. The Court admitted the document in evidence as to the defendant Weiss. The defendant Weiss objected to the same, and the Court overruled the objection, to which the said defendant

(Testimony of Fred A. Sander.)

Weiss duly excepted. The documents were marked U. S. Exhibit 14 in evidence.

The Witness: I sent a bill for the services which my company rendered in this matter.

Q. To whom did you send the bill?

Counsel for the defendant Feigenbaum objected to the question upon the ground that the same was self-serving. [244] The Court overruled the objection to which counsel for the defendant Feigenbaum duly excepted.

The Witness: We sent an invoice to the Francisco Distributing Company.

Mr. Colvin: Q. At whose direction did you send your invoice to the Francisco Distributing Company?

A. Mr. Weiss. Counsel for the defendant Goldsmith objected to the question on the ground that it was incompetent, irrelevant and immaterial, not binding upon the defendant Goldsmith and hearsay. The Court admitted the testimony as to the defendant Weiss.

Examination by Mr. Weiss: I don't recall right at the moment that you also handed some documents to one of my associates in the office when I was not present. It might be possible that you handed some other documents to my associate, Mr. Higgins. I distinctly remember that you handed the documents on the first car over to me. As to the second car, I believe the same thing occurred but I finally, eventually gave them over to Mr. Higgins at a later time during the day or the following day, to get the bills

(Testimony of Fred A. Sander.)

of lading and arrange for the car. I can't remember at this time whether I asked you to turn those documents over to Mr. Higgins. I will say this, that you have given me the greater amount of all those documents. There might have been some that you gave to Mr. Higgins. I can't say that far back because we handled so much stuff. My statement is that I am not definite with respect to that.

Redirect Examination

By Mr. Colvin:

As to the first document, I am positive that those documents came from Mr. Weiss. As to the second carload, I recall Mr. Weiss talking to me, and later these documents came into my possession [245]

Recross Examination

By Mr. Friedman:

The first car was the Pennsylvania Railroad car and the Baltimore & Ohio was the second car. The first car was PRR 568500, the second car being B & O 174149. Thereupon, counsel for the Government stated to the jury the substance of the documents in evidence as follows: Government's Exhibit No. 2 is a Wholesale Liquor Dealers' Form 52-A and 52-B for the month of December, 1943. As part of this exhibit, on page 1 thereof is a record of the purchase of 2076 cases of whiskey through the Penn Midland Import Company of New Jersey from the Ben Burke, Inc. Government's Exhibit No. 3

(Testimony of Joseph N. Nathanson.)

tion there. I can't see that that would do any harm.

Mr. Friedman: I would ask your Honor to limit this testimony so that it does not go in as against the defendant Feigenbaum, who is not within either of the categories mentioned by Mr. Colvin.

Mr. Riordan: Before the Court rules on that may I for the record, for the defendant Blumenthal, adopt the objections made by Mr. Friedman and Mr. Duane, and object upon the further ground that it is an unlawful delegation of power in any event, also reiterating Mr. Friedman's objection particularly as to Mr. Blumenthal, that this is in no way binding upon the defendant Blumenthal as far as this evidence goes, because of the fact [252] that there is no tie-in regarding any records here, everything that has been introduced at this time concerning it. I realize your Honor has that in mind.

The Court: I will instruct the jury that the instructions as to this order of the Price Administrator are now only being considered by the jury as against the defendant Goldsmith and if it is connected up with the other defendants it may be admitted later as to them.

Mr. Duane: May I, then, in behalf of the defendant Goldsmith, your Honor, make this further objection: that the order referred to and promulgated by the Office of Price Administration, and the Price Administrator, is invalid and void, and that such order was adopted by the use of a dele-

(Testimony of Joseph N. Nathanson.)

gation of power which of itself was invalid in this case.

The Court: That objection will be overruled and an exception noted.

Mr. Duane: Exception.

Mr. Riordan: Exception.

Mr. Colvin: If it please the Court—have we called the roll, gentlemen? For the sake of clarifying this for the jury and myself, may we have the last question and answer read to Mr. Nathanson?

The Court: Your last question was, you were asking him to state whether or not what was stated in that order was so. Counsel objected and said that called for the contents of the regulation, and I sustained an objection. That is as far as we got.

Mr. Colvin: Q. Mr. Nathanson, you are familiar with Maximum Price Regulation 193 in effect at the time of these sales which we have been discussing, that is, during the months of December 1943 and January 1944? A. Yes.

Q. Did that maximum price regulation allow for more than one price from the distiller to the wholesaler? [253]

Mr. Friedman: May I have that question read, your Honor?

(Question read.)

Mr. Friedman: I will object on the ground the regulation is the best evidence.

Mr. Riordan: Opinion and conclusion and no foundation laid.

The Court: Objection sustained.

(Testimony of Joseph N. Nathanson.)

Mr. Colvin: That is subject to a proper instruction on that matter from the Court to the jury.

The Court: You submit what you think the Court should instruct the jury as to the regulations, and if they are pertinent, the Court will instruct them that way. I do not think anything is gained by having the witness state what the regulations are.

Mr. Colvin: May I have Government's Exhibit 7 and 8? Q. Mr. Nathanson, I show you Government's Exhibit No. 7 and ask you to examine the same. You are familiar with this document, Mr. Nathanson? A. Yes.

Q. You are familiar with the data thereon?

A. Yes.

(The Witness Continuing): I am familiar with Government's exhibit No. 8 and with the data thereon.

Q. Mr. Nathanson, I call your attention to Section 24 of the Alcoholic Beverage Control Act, said section being published at page 2017 of the California Code General Laws and Constitution, 1941 Supplement of Deering, published by Bancroft and Whitney Company, and ask you if you are familiar with that section? Counsel for the defendant Goldsmith objected to the question upon the ground that the same was incompetent, irrelevant and immaterial. The Court overruled the said objection, to which counsel for all of the defendants duly Excepted. [254]

(The Witness Continuing): I am familiar with Maximum Price Regulation 445 published at 8

(Testimony of Joseph N. Nathanson.)

Federal Register 11161. That Regulation establishes the maximum price per case for the sale by a wholesaler of a case of twelve bottles, each of which twelve bottles contains one-fifth of one gallon of Old Mr. Boston Rocking Chair Whiskey, distilled by Ben Burke, Inc., said sales occurring during the months of December, 1943 and January, 1944 in this district and relating to transactions recorded in this freight bill which I have examined. Counsel for the defendant Feigenbaum objected to the question on the ground that the Regulations were the best evidence. Thereupon, counsel for the Government, Mr. Colvin stated that the Maximum Price Regulation as to wholesale sales of distilled beverages in this district was not fixed by one single regulation but by formula, that there were really four components in that formula, the first, or No. 5 under Maximum Price Regulation 193 which sets the maximum cost to the wholesaler at \$19.24, the second component being the local tax which arises under Section 24 of the California Alcoholic Beverage Act, which sets the price for twelve $1/5$ bottles of distilled beverage at \$1.92, and that the next element of the price arose from the actual freight charge which, in this case, was 81c. Counsel for the defendant Blumenthal objected to the statement upon the ground that counsel for the Government was stating evidentiary matter and assuming matters not in evidence. The Court stated that the jury should not take into account the statements of counsel as to

(Testimony of Fred A. Sander.)

is similarly a summary of Forms 52-A and 52-B. On page 1 thereof is a record of the purchase of 1964 cases of whiskey from the Penn Midland Import Company of New Jersey, the distiller being Ben Burke, Inc., and the railroad car being given as 174149.

These three Manila envelopes, Exhibits 4, 5 and 6, are also Forms 52-A and 52-B. The only purpose for which they are admitted is to show that there is no record of 52-A and 52-B of the Francisco Company of Old Mr. Boston Rocking Chair Whiskey from the date beginning March, 1942, to the beginning of December, 1943. Government's Exhibit No. 7 is an exact copy of a freight bill order upon Penn Midland Import Company, concerning 2076 cases of liquor, alcoholic whiskey and "Francisco Distributing Company" appearing thereon, and the freight bill being \$1689.99. Government's Exhibit No. 8 is a freight bill, copy of the original order on Penn Midland Import Company, Francisco Distributing Company, showing the number of packages, articles and marks, 1964 cases 4/5 quarts Rocking Chair Whiskey. The amount of freight to be charged is \$2065.79 net, car initials B&O 174149. This document relates to the Penn Railroad car 568500 and is a copy of the San Francisco Warehouse Company's receipt for 650 cases of Old Mr. Boston Rocking Chair Whiskey, which were part of a shipment, and being Exhibit No. 9.

Exhibit 17 is a sheaf of invoices, instructions and records of serial numbers, and are the distribution

(Testimony of Fred A. Sander.)

of various cases of whiskey by San Francisco Warehouse Company.

Exhibit No. 11 regards the instructions and invoices as to the 650 cases already mentioned in Exhibit No. 9, which 650 cases were in the car PRR 568500.

Exhibit No. 12 is the record of the receipt by the San Francisco Warehouse Company of 1964 cases of fifths of Old Rocking Chair Whiskey. - Exhibit No. 13, the invoices, the serial numbered records and the copy of the bill of lading arising from the dealings of the San Francisco Warehouse Company with B&O car 174149.

Exhibit No. 14 completes the car B&O 174149 and is a record of the remaining 539 cases, that record being a copy of the invoices and records of the serial numbers of the cases and copy of the bill of lading which was a part of the transaction relating to this whiskey of the San Francisco Warehouse Company.

FRANK DITO

called as a witness for the Government and having been first duly sworn, testified:

Direct Examination

By Mr. Colvin:

I am assistant cashier and chief clerk at the Bank of America, 9th and Market branch. I have been

(Testimony of Frank Dito.)

so employed 22 years. During the months of December, 1943, and January, 1944, I was chief clerk. I am in charge of the entire branch. The Francisco Distributing Company had an account at that branch during the period of time to which I have just alluded. The signature cards relating to that account were kept as accounts in the records of the bank under my direction and supervision. I am here pursuant to a subpoena from the clerk of the [247] District Court which directed me to bring a signature card or cards with me. (The signature card was marked U. S. Exhibit 15 for identification.

The Witness: (Continuing) The subpoena directed me to bring with me certain collection records in my branch of the bank relating to the Francisco Distributing Company, the transactions taking place during the months of December 1943 and January 1944. The first one in point of time is November 29, 1943. Collection record No. 321984 which bears the date 11/29/43 in typewriting and the mark "Paid Dec. 15, 1943" is the original record of my bank kept under my direction and supervision and taken from the files by myself. (Thereupon the said document was marked U. S. Exhibit 16 for Identification. Collection record No. 610004 now shown me, dated in typewriting December 4, 1943, marked "Paid Jan. 3, 1944," is a record of my bank kept under my supervision and taken from the files by myself. (The document was marked U. S. Exhibit 17 for identifica-

• (Testimony of Frank Dito.)

tion.) Pursuant to the subpoena I was directed to bring certain account records of the Francisco Distributing Company. I have brought them. These are for the months of November and December 1943 and January 1944. Those were the months during which the collection records came into possession of my bank. The account record now shown me for November of 1943, Francisco Distributing Company, 122 Tenth Street, San Francisco, California, was kept under my direction and supervision in the regular course of business by the bank, and I brought it from the file myself and my answer would be similar as to the documents bearing the dates of December 1943 and January 1944. (The said documents were marked U. S. Exhibits 18, 19 and 20, for identification.) My attention being called particularly to Government's Exhibit 16 for identification, I have an independent recollection of that transaction. We register on our [248] collection form, and then we either call or send a notice. The first thing we do is write the collection upon our collection record, which is this form here. I did that in this particular case. I sent a notice to the Francisco Distributing Company. Government's No. 16 and Government's No. 17 were handled separately. As to Government's No. 16, the notice was sent right to the Francisco Distributing Co.

Q. Did Mr. Goldsmith visit the bank with reference to this transaction?

Counsel for the defendant Goldsmith objected

(Testimony of Frank Dito.)

to the question upon the ground that it was leading and suggestive, the court overruled the said objection, to which ruling counsel for the defendant Goldsmith duly Excepted.

A. I did.


Mr. Colvin: Q. What happened, Mr. Dito?

A. The draft was paid.

Mr. Friedman: Just a moment. Now I am going to object on behalf of the defendant Feigenbaum, on the ground that any transaction with the defendant Goldsmith in the bank out of his presence in which there is no showing he is connected is not binding upon him.

The Court: The testimony will be admitted as against the defendant Goldsmith.

The Witness: (Continuing) Mr. Goldsmith directed that the draft should be paid. Mr. Goldsmith directed me that the draft named in Government's Exhibit No. 17 be paid. I had no dealings with Mr. Weiss during that period of time. Subsequent to that direction the account of the Francisco Distributing Company was charged with the amounts of the two drafts, and the sight drafts were released to Mr. Goldsmith. [249]



JOSEPH N. NATHANSON

called as a witness on behalf of the Government,
and having been first duly sworn, testified:

Direct Examination

By Mr. Colvin:

I am Price Specialist for the San Francisco District Office of the Office of Price Administration. I have been so employed from October 1942 up to the present time. As a price specialist, I have acted in setting up and interpreting a price with relation to the alcoholic beverage regulations and drugs and chemicals. I am familiar with Government's Exhibit No. 2 and with the data therein contained. I am familiar with Government's Exhibit No. 3, and particularly with the data contained on page 1, after the first page. I am familiar with Order No. 5 under M.P.R. 193, published in 8 Federal Register 6866, which is now shown me.

After discussion between counsel and the court, the following proceedings occurred:

The Court: I will instruct the jury at the present time that pursuant to the authority given to him by statute, the Price Administrator on May 22, 1943 promulgated an Order No. 5 in which he fixed the maximum prices for all sales by Ben Burke, Inc., Foster & Company, and American Distilling Company as follows: That on or after May 24, 1943 Ben Burke, Inc., Boston, Massachusetts, Foster & Company, New York City, and American Distilling Company, Beacon, Illinois, may sell and deliver to any person, and any person may buy

(Testimony of Joseph N. Nathanson.)

and receive from those sellers Old Mr. Boston Rocking Chair whisky, a blend of straight Bourbon whiskies, 80.6 proof, aged as above, at the [250] following prices: \$19.24—that is not in issue; that is another kind of whisky?

Mr. Colvin: That is for pints.

The Court: \$15.37 plus \$3.87, being the amount of the increased Federal excise tax of November 1, 1942 applicable thereto, or a total of \$19.24 per case of 12 bottles, each bottle containing one-fifth gallon of such whisky.

Now, do you wish to take an exception to that?

Mr. Friedman: Yes, your Honor. I wish to object to what your Honor has told the jury, and I ask your Honor to instruct the jury to disregard anything you have just read from the Federal Register or advised them about, upon the following grounds:..

First, that the purported order is only an order that regulates processors of these particular distilled spirits; it has nothing to do with wholesalers; it has nothing to do with people who buy from wholesalers or jobbers—that is, the portion you have instructed the jury about—and therefore that this portion of the order is not binding upon Mr. Feigenbaum in this case, who is neither a processor nor a wholesaler of distilled spirits.

Secondly, upon the ground that the order on its face is in violation and in excess of the power conferred by the Emergency Price Control Act for these reasons: That under the Emergency Price

(Testimony of Joseph N. Nathanson.)

Control Act the Administrator has the power by general order and by general order only to fix the prices of any commodity within a particular area or region, and that he has not the power and never was given the power by Congress to fix different prices for different people for the manufacture of the same kind of article, and this is a special order applicable only to certain people. [251]

The Court: Do you propose to follow this up with further regulations with respect to the prices fixed for sale at wholesale?

Mr. Colvin: Yes, your Honor.

The Court: And this is preliminary to that?

Mr. Colvin: Yes, your Honor.

The Court: I will overrule the objection, and an exception may be noted.

Mr. Duane: If the Court please, in behalf of the defendant Goldsmith I desire to offer the objection that this testimony and this regulation for this purpose is incompetent, irrelevant and immaterial. We are not here charged with any dealings with Burke or the American Distillery or anyone else.

The Court: I understand that.

Mr. Duane: We urge our objection on that ground.

The Court: I have instructed the jury as to that regulation and overrule the objection upon the statement of the District Attorney that it is preliminary to showing a further price regulation for sales by wholesalers. There may be some connec-

(Testimony of Joseph N. Nathanson.)

the evidence unless satisfied that counsel was correctly stating the evidence, but that the Court assumed that Counsel for the Government was trying to explain the Regulations that fix the price, which was the price charged by the distiller to the wholesaler, plus the California Tax [255] plus the freight. Counsel for the Government stated that the statement of the Court was correct, and that, taking the three components, Regulation MPR 445 section 5.4 provided the multiplication of those component parts by 1.15 in order to establish the maximum wholesale price in this district, arising from the freight charge, the tax and the maximum cost to the wholesaler.

Mr. Colvin: Mr. Nathanson, how do you calculate the price as to Old Mr. Boston Rocking Chair Whiskey distilled by Ben Burke and Company for cases of fifths, which were shipped as recorded in the freight bills which are Government's Exhibits No. 7 and 8 in evidence? Counsel for the defendant Feigenbaum objected to the question but, before the objection was completed, the Court stated that the evidence was being admitted only as against the defendant Goldsmith. Counsel for defendant Goldsmith objected to the question upon the ground that the matter was one of calculation, and that many persons would not understand how to make the calculation. The Court overruled the objection, to which ruling of the Court counsel for the defendants duly Excepted.

(The Witness Continuing): The wholesaler's

(Testimony of Joseph N. Nathanson.)

price to the retailer under Maximum Price Regulation 45 is based upon the percentage mark-up of 1.15 on his net cost. The net cost has three elements. The first is the net purchase price through November 2, 1942; the next item is the freight from the shipping point to the receiving point; the third element of cost is the State Excise Tax. In this instance the price from the distiller to the wholesaler through November 2, 1942, was \$19.24; because that reflects the increased taxes of November 1st, 1942. The freight to San Francisco per case [256] is 81c. The State Excise Tax on a case of fifths, \$1.92, making a total of \$21.97. Then, we apply the percentage markup that is allowed the wholesaler, multiply that, 1.15 or \$21.97, which gives the total sum of \$25.27 per case. That would be the price from the wholesaler to the retailer FOB San Francisco for the particular merchandise.

Cross Examination

By Mr. Duane:

After I get all through with these calculations, I conclude that the selling price for this particular whiskey at the time referred to is \$25.27. However, if it were sold by the wholesaler to the retailer for \$24.50, it would be sold considerably under the selling price.

CECIL F. COUGHLIN

called as a witness by the Government and, having been first duly sworn, testified:

Direct Examination

By Mr. Colvin:

I am Deputy County Clerk of San Francisco. I came here today pursuant to a subpoena which directed me to bring File No. 20775 in the office of the County Clerk. I have brought that document with me. The document in question was marked U. S. Exhibit 21 for identification.

NORMAN REINBURG

called as a witness by the Government and, having been first duly sworn, testified:

Direct Examination

By Mr. Colvin:

I have a restaurant in Vallejo with a saloon license named Dopey Norman's. I operated that restaurant and bar [257] during the month of December, 1943 and the month of January, 1944. During that period of time, I purchased some cases of Old Mr. Boston Rocking Chair Whiskey in denominations of fifths. I made two such purchases. It was purchased from the Francisco Distributing Company. I had a conversation regarding the purchase of the first quantity of whiskey with Mr.

(Testimony of Norman Reinburg.)

Abel, the gentleman whom I see there in the grey suit. (Indicating the defendant Abel.)

Counsel for the defendants Goldsmith and Blumenthal objected to the testimony upon the ground that it was not binding upon the said defendants, and the Court stated that, for the present, the testimony would be admitted as against the defendant Abel only.

My first conversation with Mr. Abel regarding Mr. Boston Rocking Chair Whiskey was early in December, the 6th, or 3rd or 4th, and took place on the sidewalk in front of my place. Just myself and Mr. Abel were present. All I talked about was 100 cases of whiskey. He wanted to sell me the whiskey. We dickered about the price of it, and finally arrived at a price of \$65.00 a case. I did not pay any money to Mr. Abel at that time. I later gave him a check for \$2,450 for the first 100 cases of whiskey. After the man gave me the bill for it, I know the money had been received directly, I gave him the rest of the money which totalled \$6,500 for the first 100 cases. Mr. Abel gave me the bill. The document now shown me marked U. S. Exhibit 22 for identification entitled "Francisco Distributing Company No. 10090, San Francisco December 17th, 1943" is the invoice to which I just referred. I gave the check in this case to Mr. Abel about the 6th or the 3rd of December. That check was made out to this letterhead here, Francisco Distributing Company. I made out the check myself. At Mr. Abel's direction I made it

(Testimony of Norman Reinburg.)

[258] out to the order of the Francisco Distributing Company and the amount of that check was \$2,450, as I stated. I made it out for \$2,450 at Mr. Abel's direction.

Q. At the time you gave the check to Mr. Abel what was said with regard to the payment of cash?

Counsel for the defendant Abel objected to the question upon the ground that the same was leading and suggestive. The Court overruled the said objection, to which counsel for the said defendant Abel duly Excepted.

The Witness: That I pay the balance in cash upon receipt of the bill.

Mr. Colvin: Q. Did Mr. Abel say that was the selling price, \$2,450? A. Yes.

Counsel for the defendant Abel objected to the question upon the ground that the same was leading. The Court overruled the said objection, to which counsel for said defendant duly Excepted.

(The Witness Continuing):

Mr. Abel did not tell me where the whiskey was coming from. The only thing said regarding the whiskey at the conversation at which I gave Mr. Abel the check was about the cash. The cash was to be delivered when he gave me the bill. He told me it would come from the Francisco Distributing Company. That was the complete content of that conversation with Mr. Abel.

Q. Were 100 cases of Old Boston Rocking Chair Whiskey delivered to you?

Counsel for the defendant Blumenthal objected

(Testimony of Norman Reinburg.)

to the question upon the ground it was incompetent, irrelevant, immaterial and called for the opinion and conclusion of the witness. The court overruled the objection, to which counsel for the defendant Blumenthal duly Excepted. [259]

(The Witness Continuing):

I got the whiskey. I made a second purchase of Old Mr. Boston Rocking Chair Whiskey during the month of December, 1943. I purchased that whiskey from the same people, the same channel, the same man. I paid for that whiskey exactly as the other, \$2,450 by check and the rest by cash. It totalled \$65.00 per case. I had the same conversation as before with Mr. Abel regarding this transaction. It took place around the 13th or 14th of December, right in front of the place of business. No one else was present beside myself. The conversation was the same thing, the 100 cases for the same price. Mr. Abel said the same as he did on the first 100 cases, repeated the same thing. Abel wanted to sell me 100 cases of whiskey, and I wanted to buy 100 cases of whiskey. The price was \$2,450 by check, which was the ceiling price. I gave him the check; I got my bill, and when I got my bill I gave him the rest of the money totaling \$65.00 for each case. The rest of the money was paid by cash; that cash was delivered to Mr. Abel. The whiskey was subsequently delivered to me. This invoice now shown me headed "Francisco Distributing Company No. 10140" is the invoice covering the second sale of whiskey by Mr.

(Testimony of Norman Reinburg.)

Abel that I have recounted. That whiskey arrived around January 6th or 7th. The document referred to was marked U. S. Exhibit 23 for identification.

(The Witness Continuing):

During this period of time I traveled to San Francisco with Mr. Abel on two occasions. The first occasion was about the 6th or 7th of December. I took Mr. Abel with me in my car. I took him in the downtown section here about three or four blocks off Market, around Third or Fourth. The place was a jewelry store pawn shop, sports goods. [260] I let Mr. Abel off at this sports goods shop. I had a conversation that I would pick him up there in half an hour. I drove down there on the date of the first trip at Mr. Abel's direction. He did not say to drive to this particular sports goods shop; he said "up that street, down that street and stop here".

Counsel for the defendants Abel and Blumenthal objected to this testimony. The Court overruled the objection, to which ruling counsel for the said defendants duly Excepted.

(The Witness Continuing):

I subsequently, pursuant to the arrangement which I had made, came back and picked Mr. Abel up and brought him back to Vallejo. I did not have a conversation with him regarding his trip to that place. I made a second trip to San Francisco with Mr. Abel about the 16th or 17th of De-

(Testimony of Norman Reinburg.)

cember. I traveled to San Francisco the same way, in my car. I took him over and brought him back. I took him to the same section of the city, about three blocks off Market, about Third Street there. I observed Mr. Abel going in this pawn shop and sports shop, which I named. I did not have any conversation with him regarding taking him to that place on the way down; just that I would meet him there. He said he would meet me at the same place, dropping him off at the same place, that was all. I picked him up about a half hour later and brought him back to Vallejo, just as I did before. In the meantime I was around town, just waiting. I made more trips to San Francisco during the month of December. I came over and tried to get some more whiskey without paying that price. I went to the Francisco Distributing Company. That was around the 10th of December. It was after the first [261] trip I made and before the second one to the Francisco Distributing Company. The same man was behind the counter. He wouldn't give me any business at all. I do not see that man in the court room. I did not make a purchase of any whiskey at that time. After visiting there, I went down to the pawn shop where I left Mr. Abel off on the first occasion of my trip to San Francisco. I went into the pawn shop. I tried to do business with whiskey and nobody talked to me. They weren't interested. I do not remember what person I saw in that pawn shop. I was unable to do

(Testimony of Norman Reinburg.)

any business at the pawn shop. They did not say that they sold whiskey there. They didn't know what I was talking about. At that time I returned to Vallejo.

Cross Examination

By Mr. Wolff:

The pawn shop that I went to where the parties said they did not know what I was talking about was the same place where I had taken Mr. Abel on two occasions. I do not operate my business under any other name than Dopey Norman's. It was "The Brig" when I bought it in 1941. I operated a restaurant there with a liquor license; I did not have gambling. I had a conversation with Mr. Abel on the sidewalk in front of my place of business some time in the forepart of December, 1943. Mr. Abel is always on that street. He is in the jewelry business and is up and down that street quite often. Mr. Abel was working for a Mr. Davis, who had a jewelry store there about three quarters of a block from my place. I met Mr. Abel on the sidewalk in front of my own place, I am sure of that. My place is closed until about 5:00 o'clock in the afternoon, and we go out and walk up and down and get a little sunshine and see who is who and why, and I spent that recreation time right on that sidewalk, and Abel is usually along all the time. Both of us were taking a sort [262] of a sun bath, and in the course of this perambulation I met Abel in front of my place

(Testimony of Norman Reinburg.)

of business. I had no previous appointment to meet him there, it was just in the ordinary course of operations of walking back and forth. I was anxious to get liquor when I met Mr. Abel on this first occasion in the forepart of December, 1943. I don't know what to tell you was the first thing Mr. Abel said. I am the man who hollered for the whiskey. I needed the whiskey. I was out of whiskey entirely. When I met Mr. Abel in the course of this walking, I told him I was anxious to get whiskey. I told the man I was practically out of whiskey. I didn't have any more whiskey. In response to that Mr. Abel said, "I think I know some place where you might get some". I don't know whether he mentioned Mr. Davis. He said, "Perhaps I can get you some whiskey". Mr. Abel never delivered any whiskey to me. I said in my testimony I gave Mr. Abel some checks, or a check. I gave him one check for each of us. They were for \$2,450. I don't know who cashed the check. It was made out to the distributing company. I gave that check to Mr. Abel. Mr. Abel said to me, "I will look around and try to get you some liquor, Norman". He went out of his way two or three times to get me whiskey, and he couldn't do it because it wasn't a legitimate setup. We both turned it down, and when he came along with this Francisco Distributing Company I accepted it because he had a bill which was correct with the state law. On two or three occasions, Mr. Abel went to get some liquor, and we both turned

(Testimony of Norman Reinburg.)

it down because it didn't look like it was a legitimate deal. In other words, Mr. Abel was trying to do me a favor, all the way through. He wasn't in the liquor business. He was associated with the liquor business. He knew what he was talking about; he knows brands; he knows about whiskey. He says he was with a company up in Stockton that [263] sold whiskey before that he was friendly with. Whether he worked there or not, I don't know, and he never said either whether he worked there, or whether they were just friends. He told me he was a jewelry salesman. He likes his job, but he would try to help me get a little whiskey. On the first occasion that I drove Mr. Abel over here, I did not see him go into any particular place. The second time, I drove him to the same place, drove off and went away. At the corner, I did not see him go into any place, and I came back to that corner and picked him up on both occasions. I did not have any conversation with Mr. Abel as to where the check was going to be placed. He said he would take the check over and try to get a bill for the whiskey. That check for \$2,400 was on the basis of \$24.50 per case. When it came to the matter that he gave me some cash, he told me where that was to go; it went where the whiskey is. I don't know whether he kept any of it, that is his business. He did not ask me for anything personally. I have a check book in my office. This check for \$2,450 that I say I gave to Mr. Abel on the first purchase and the second purchase came

(Testimony of Norman Reinburg.)

back from the bank. I do not have them in my possession. I gave them to the State Board man in Vallejo, Mr. Patterson.

In response to a question by Mr. Wolff, Mr. Colvin stated the Government did not have the checks in its possession. The first check was made payable to Francisco Distributing Company, and the second check exactly the same. I testified on direct examination that I went to the Francisco Distributing Company in an endeavor to purchase some liquor and at that time I was not able to make any such purchase. I went there alone. I also testified that I went to a place which I designated as a pawn shop. At that time I sought to [264] make a purchase of some liquor. When I went over there I went alone.

Redirect Examination

By Mr. Colvin:

Mr. Davis runs a place of business in Vallejo which is in the same block as my place of business; that place of business is a jewelry store and pawn shop. This store in San Francisco on Third Street, to which I have referred is a sports goods store. It had things in the window; it had fishing poles with Neon lights. It is on this side of Market Street, the same side we are on now.

(Testimony of Norman Reinburg.)

Recross Examination

By Mr. Riordan:

I have testified that that whiskey was Old Mr. Boston Rocking Chair Whiskey. It was really very good whiskey, it was all right. I don't always rely on the label.

JOHN GIOMETTI

called as a witness on behalf of the Government, and having been first duly sworn, testified:

Direct Examination

By Mr. Colvin:

I have the Owl Cafe, 121 Georgia Street, Vallejo, California, and hold a liquor license at those premises. I was in that business during the month of December, 1943, and the month of January, 1944. During those months, I purchased some Old Mr. Boston Rocking Chair Whiskey from The Francisco Distributing Company. I paid \$65 a case for that whiskey. I gave a check to Norman Reinburg and the cash, and he got me the whiskey.

Counsel for the defendants Blumenthal and Feigenbaum objected to the evidence as not binding upon the said defendants, [265] and the Court stated that it was admitted only as against the defendant Goldsmith. Counsel for the defendant Goldsmith objected upon the ground that there was

(Testimony of John Giometti.)

no foundation for the testimony as to the defendant Francisco Distributing Company, and no evidence containing it, so that the witness Reinburg repeated the same, and the Court struck out the testimony of the witness that he made the purchase from the Francisco Distributing Company.—

(The Witness Continuing):

I purchased 50 cases of Old Mr. Boston Rocking Chair Whiskey. I had the conversation regarding the purchase of the whiskey with Norman Reinburg. The conversation took place early in December of 1943—say the 6th or 7th. Just Mr. Reinburg and I were present. The conversation took place at Norman Reinburg's place of business. Subsequent to that conversation, 50 cases of Old Mr. Boston Rocking Chair Whiskey were delivered to me, I would say, in February, 1944. I seen the invoice now shown me entitled "Francisco Distributing Company No. 10171". I saw that when I got the delivery of the whiskey. The Kellogg Express Company gave me the bill and the invoice; that invoice was kept by me as a record of my business, directly under my care and custody. That is the shipping bill to which I have referred. The shipping bill and the invoice were delivered to me together. The said invoice was marked U. S. Exhibit 24 for identification and the shipping bill, U. S. Exhibit 25 for identification. I gave the check and the cash for the whiskey to Norman Reinburg. The check was made out to Francisco Distributing Company. It is not in my possession.

(Testimony of John Giometti.)

I got this cashier's check from the Bank of America and paid \$1,225 for it. I gave the check to Mr. Norman Reinburg. [266]

Q. At that time, did you give any cash to Norman Reinburg?

Counsel for the defendants Goldsmith, Abel and Feigenbaum objected to the question upon the ground that the evidence was not binding upon the said defendants. The court overruled the said objection, to which ruling of the Court counsel for the defendants duly Excepted.

The Witness: I gave him the balance of the \$65 a case.

(To the Court): \$2,025.

Subsequent to that time I had a conversation with Mr. Louis Abel regarding this transaction. I would say the conversation took place after I received the first shipment, I would say a couple of months after I received the whiskey previously. He had a jewelry store in front of Mr. Norman Reinburg's place. The conversation took place inside of the jewelry store. Beside Mr. Abel and myself, some fellow was present representing Hart's Distributing Company... That is a liquor company.

Mr. Colvin: Q. What was that conversation with Mr. Abel regarding your purchase of this whiskey?

Counsel for the defendants Goldsmith and Abel objected to the question, the former on the ground that it was incompetent, irrelevant and immaterial,

(Testimony of John Giometti.)

and counsel for the defendant Abel objecting upon the same ground and upon the further ground that it was not within the issues of the subject-matter of the conspiracy charged in the indictment, for the reason that anything that the defendant Abel may have said, if it was subsequent to the conclusion of the transaction, would not be within the issues, and would not be competent or pertinent after the transaction had been concluded. [267] The court overruled the said objection, to which ruling counsel for the said defendants duly Excepted.

The Witness: He said he could get me some whiskey if I wanted to get it, and he said he could probably get it a little cheaper, and in that way—well, he would save me \$5 a case; \$60 a case, so I told him I paid \$65 a case for it once, and I wouldn't go for it again. That was all that was said. He said the whiskey I got at Francisco Distributing Company went through his hands, and he could get me the same deal. He said he just took the money I gave Norman Reinburg, the money I gave to Norman Reinburg was given to him, and he took it to the "big shot", and he could get me the figure of \$60 a case, and I wouldn't go for it no more because I figured I was paying too much for it in the first place, and I didn't think I would get a legitimate bill. He did not say who the "big shot" was. He said the "big shot" was in San Francisco.

Examination by Mr. Wolff:

I had my first conversation with Mr. Reinburg

(Testimony of John Giometti.)

about the purchase of any liquor after he got his shipment, I would say in the latter part of December, 1943. I met Mr. Reinburg at his place when I had this conversation with him about the purchase of the liquor. I was there for the purpose of enlisting him to get me some liquor. Just Mr. Reinburg and I were present. He said he just got some whiskey, and he would help me out to get some for me. I did not ask him to get me some whiskey. I went over there. We were talking about the whiskey situation, and everybody was out of whiskey, and he said he just got some whiskey, and he would try to get me some. I went over there for the purpose of asking him to try and get some whiskey for me. That is [268] when the conversation started. I said I would like to get some whiskey. I told him I would like to get 50 or 100 cases, whatever he would get for me. I did not tell him the type of whiskey, I didn't care, anything. I asked him how much it would cost. I did not tell Mr. Reinburg what price I wanted to pay or make any statement in connection with that subject-matter. He told me it would cost \$65 a case to get the liquor. I told him I was satisfied as long as I got a legitimate bill. The amount of the legitimate bill was \$24.50 a case. By legitimate bill, I mean you have to have a bill for your whiskey. I mean I wanted a bill for the whiskey. After I got the bill for the whiskey, the bill was \$1225. The Kellogg Express Company delivered it to me. When they delivered it to me I did not

(Testimony of John Giometti.)

give them any money. I went over and saw Reinburg again. I did not take the money for the liquor over to him. I had already given him the money before I got the whiskey. I gave it to him in advance. I gave him a check and cash, and they delivered me that in January, 1944, about fifteen days before that. I got the bill with the delivery. He told me he made his out to Francisco Distributing Company, and he told me to do the same. Then I went to the bank and got a cashier's check, and that was at least fifteen days in advance of the time the whiskey was delivered. I told Mr. Reinburg then "Here is a check and money", and he says, In at least fifteen days I would get my whiskey. I waited fifteen days and I got the whiskey. That is all I knew about it. The conversation that I testified to that I assert I had with Mr. Abel took place approximately two months or more subsequent to the time I got the delivery of the liquor. I didn't have a conversation with Mr. Abel on the matter until some time in March or April, 1944. I didn't go to his place of business to [269] see him, I just happened to be in there. There was no transaction at all, I just happened to be in his place. Mr. Abel told me that he knew I had gotten some liquor through Mr. Reinburg. He says to me, "Here is a fellow who can get some whiskey, and he got some previous to that"—that he had something to do about it, he knew where he got it, and he could get me.

(Testimony of John Giometti.)

some more. I never got any more from that source. Mr. Abel did not get me the whiskey. I never gave Mr. Abel any money.

(To Mr. Riordan): I knew that man Norman got Rocking Chair Whiskey, so I knew I was going to get the same thing.

(To Mr. Wolff): I never talked about whiskey with Mr. Abel prior to this conversation I had in his store in March or April, 1944. He didn't work, he owned a place, it was a jewelry store. I do not know a man named Peter Davis. I have heard of him. I do not know him previously. I think he has a jewelry store in Vallejo, up the street. That is not the place to which I went when I met Mr. Abel. I went to 122 Georgia Street, right across the street from my place. My place is 121 Georgia Street, Vallejo. I went right across the street, and that is where Abel had his place. I didn't get to visit him at all. I just walked in the place. I have been in there one hundred times before, just walking over there, just look around, kill time, and go back to work. Most of the time Mr. Abel and his wife are operating or conducting the place. I was in there numbers of times. I didn't say that I was on very definite acquaintanceship with him. It is more neighbor, more than anything else. You know a fellow, you go over and see him. I knew Mr. Abel before that. I had never had any transactions with him. I would say it was a social [270] relationship. I just went over there to say hello to him. I was friendly with the man.

VICTOR FIGONE

Called as a witness by the Government, and being first duly sworn, testified:

Direct Examination

By Mr. Colvin:

I have a cafe and saloon combined at 455 San Pablo Avenue in El Cerrito. I have been in that business since November 11, '33, and was in that business during December of 1943 and January of 1944, and held a liquor license at that place. During the month of December 1943 I made a purchase of Old Mr. Boston Rocking Chair Whiskey. I purchased the whiskey from some gentleman in the Francisco Distributing.

Counsel for the defendant Goldsmith objected to the question upon the ground that the foundation therefor had not been laid, and counsel for the defendant Blumenthal objected upon the ground that it was not binding upon the said defendant and as to him was hearsay.

The Court stated that the evidence would be admitted only as against the defendant Goldsmith.

The Witness: (Continuing) I understood that the man's name was Weiss.

Counsel for the defendant Goldsmith moved that the answer be stricken as to the defendant Goldsmith, on the ground that it was not connected with said defendant, and the Court Overruled the Objection, to which ruling counsel for the defendant Goldsmith duly Excepted.

(Testimony of Victor Figone.)

The Witness: (Continuing) At that time I did not make a purchase of whiskey over at the Francisco Distributing Company. At that time I had met this man and they told me that [271] the whiskey was not in, would be in a few days, so I went again. I later made a purchase at the Francisco Distributing of some Old Mr. Boston Rocking Chair Whiskey. I got 200 cases for myself, and then ordered 75 cases for Mr. Avila. He had heard I was over there to see if I could purchase some. The first time I went there I heard I could get whiskey at that time. The gentleman told me it would be available in two or three days, so when I went home that night Mr. Avila approached me and told me he had heard I was going to get some liquor, and asked me if I could get some for him. He told me he couldn't go over there. So I told him what I was to pay for it, and if he wanted me to get it for him I would, or would let him go with me, but he says he couldn't. Then there was a second visit when I actually bought the whiskey which I have discussed. I spoke to the same man on the occasion of both my visits. I do not see that man here in the courtroom. I have been looking here the last day or so. I have been here both days. I don't seem to see him. To my recollection—it was two years ago—there was a counter there. There were some shelves in there with some liquor in them. This fellow was standing in front of the counter. He was dressed—well, he was dressed, I would say, in a blue suit, and was a kind of short

(Testimony of Victor Figone.)

stout fellow, smooth-shaved fellow, a kind of a nice-looking fellow. When I walked in I stood there a couple of seconds, and this gentleman happened to walk over and ask me what I was looking for, or if I wanted anything, and I told him I had heard that there could be some whiskey obtained there, and I told him I was in business—at that time whiskey was hard to get, so you just had to go out and work to buy whiskey. He told me that he thought that there would be a car in in a few days. I told him, would there be any chance of me obtaining any? He [272] told me Yes, to come back in a couple of days, that he was sure it would be in. I would say the date of the earlier conversation was in December, around the 27th or 28th. There were two fellows at the Francisco Company, sitting in there, but I didn't see their faces. I did not pay any money to that man on the occasion of my first visit. The second visit I took over a check for my whiskey, \$4900, and also a check for Mr. Avila made to the Francisco Distributing Company, the same as I had made mine. I went there on the second trip and I told Melvin Avila to come over with me, but he said he couldn't, never had a bartender. I would say the date of my second visit was about the 29th or 30th. On that occasion I had a check made out when I went to the company. I think my check was \$4900. The check now shown me, entitled "90-1208, Emeryville Branch Bank of America," is the check I took with me on the occasion of my second visit. That check

(Testimony of Victor Figone.)

was made out before my arrival there. That check was made out December 29th; it must have been the 30th or 31st, because it was a day later than the time I made out the check. This fellow that I had talked to there had told me to make the check out for \$4900 for the 200 cases and then the other in cash to bring over. The other in cash was the balance to make up \$60 a case. I was paying \$60 a case for the whiskey that I bought. I brought that amount of cash with me. That cash would come to something like \$5100; I am not sure of that. I gave the check and the cash to the same fellow that I had met the first time. Beside this man and myself there was no one there on the occasion of the second trip. On the first trip was when I seen the other two gentlemen there. No one else was there at the time of the second trip unless they were in the back; there was only this one fellow. That whiskey was subsequently delivered to me around January 3d or 4th. I recognize the invoice [273] now shown to me, entitled "Francisco Distributing Company No. 10145." This here was mailed to me after I had received the whiskey; a day or so after I had received the whiskey. It was mailed to me, "Paid." We hold all our receipts for anything we buy. I do that in the regular custom of my business. We always keep duplicates of them in the place and then at our book-keeper's office.

The check was marked U. S. Exhibit 26 for iden-

(Testimony of Victor Figone.)

tification, and the Invoice referred to by the witness was marked U. S. Exhibit 27 for identification.

The Witness: (Continuing) After that time I went back later to the Francisco Distributing Company and the place was closed. That was in the latter part of January, I think. It may have been in February. This man with whom I dealt at the Francisco Distributing Company just said to make out the check to the Francisco for so much and then the other part in cash. I did not have any discussion with him about the ceiling price on this whiskey. At that time whiskey was hard to get, and I knew that the price was a little over, but I didn't discuss it with him. I wouldn't say the word "ceiling price" was used, because I don't care at that time, and he told me he billed it to me at \$24.50, but he didn't say the ceiling, I am sure.

Cross-Examination

By Mr. Weiss:

Like I say, I have been looking yesterday and today, and this man I dealt with was a short stout fellow. That man told me he was Mr. Weiss. I would recognize him if he was in this courtroom, but he is not in here. I was told and believed that I paid some money to a man by the name of Weiss [274] at the Francisco, that this man was Mr. Weiss. I cannot say, because at the time I bought the whiskey this gentleman told me that, and I noticed the billing showed the salesman Weiss. I overheard that night over in a saloon in the Inter-

(Testimony of Victor Figone.)

national Settlement that there was a salesman by the name of Mr. Weiss. I cannot identify Mr. Weiss.

Redirect Examination

By Mr. Colvin:

I don't think I heard at the time that Weiss was at the Francisco Distributing Company, I just overheard that conversation and went down there, that's all.

MELVIN AVILA

Called as a witness for the Government, being first duly sworn, testified:

I have a tavern and restaurant, the Cerrito Club, in El Cerrito. The address is 448 San Pablo Avenue. I hold a liquor license at that place. During the months of December 1943 or January 1944 I purchased 75 cases of Old Mr. Boston Rocking Chair Whiskey. All my dealings were with Mr. Figone. I paid \$60 a case for the whiskey. That payment was by some odd \$1800 by check; the rest of it cash. I delivered that check and cash to Mr. Figone. Subsequently I received the whiskey. A big dual truck came on January 3 and Vic helped me unload mine and I helped him unload his. An invoice of that whiskey came by mail within the following week, sometime, I don't remember exactly when, billed "Francisco Distributing Company." The [275] check had been made payable

(Testimony of Melvin Avila.)¹

to Francisco Distributing Company. I never went over to the Francisco Company.

Counsel for the defendant Blumenthal moved that the testimony be excluded as to the defendant Blumenthal, as not binding upon him, and the court stated that it was admitted as against the defendant Goldsmith.

Counsel for the defendant Goldsmith objected to the testimony on the ground that it was hearsay, and incompetent, irrelevant and immaterial as to the defendant Goldsmith.

The Court Overruled the said Objection, to which counsel for the defendant Goldsmith duly Excepted.

JAMES CERNUSCO

Called as a witness by the Government, and having been first duly sworn, testified:

Direct Examination

By Mr. Colvin:

I am in the tavern business and restaurant business at 747 Third Street, San Francisco. The name of that business is "Andy's Place." I was operating that business during the month of December 1943, and January 1944. During that period of time I engaged in the purchase of some Old Mr. Boston Rocking Chair Whiskey. I intended to buy some for myself and two friends of mine,

(Testimony of James Cernusco.)

Mr. John Vukota and Mr. Lewis, whose places of business were in Livermore. I made that purchase from the Francisco Distributing Company. I had a conversation with a [276] man in my place of business. He gave his name as Weiss or Wise or something. I do not see the man that I saw then here in the courtroom. I have been here for a couple of days, since yesterday, and today, and I have not seen him yet. I purchased whiskey at that time from that man. I gave the man a check for that whiskey. I believe Mr. Vukota has it in his possession, and Mr. Lewis has their checks in his possession. The checks of which I speak were delivered to that man some time in December. He came to my place of business. We drove up Mission Street, up to Third Street, between Mission and Market—I took the car there, the man got out, seemed to walk across the street. I am referring to the man who said he was from the Francisco Distributing Company. I think it was in the early part of January. He was driving the automobile. We stopped on Third Street, right near a little alley there, on the righthand side, going up Third Street toward Market. I stopped in Third Street between Mission and Market, right near an alley there. The fellow seemed to go across the street there. I don't know whether he went into the Sportorium or not.

Mr. Colvin: Q. At whose direction did you stop at that place on Third Street?

Mr. Riordan: I object to that as incompetent,

(Testimony of James Cernusco.)

irrelevant and immaterial as to the defendant Blumenthal. We are not bound by any directions.

The Court Overruled the said Objection of Mr. Riordan, to which Counsel for the Defendant Blumenthal Excepted.

The Witness: (To the Court)

The man who was driving the car stopped there. He was the man who said he came from the Francisco Distributing Company. I have seen the check now shown me, entitled, "Livermore Office, American Trust Company," made out to the [277] Francisco Distributing Company for \$450. I had this one myself. I got it from Mr. Vukota. I had given that check to the man who said he was from the Francisco Distributing Company. I gave one of these checks to that man in the early part of December, and one was in the early part of January. I gave one of these checks to that man on the day I took the ride along Third Street with him. I didn't give him the money on Third Street, though. We then drove, from Third Street we went down around Market, we came back around Second Street and then we went down near Townsend Street. Right there we parked the car and I gave him the money. I gave him the check for \$450. The check for \$2,000 was given to him the early part of December.

The check dated December 16 was marked U. S. Exhibit 28 for identification.

The check dated December 30 was marked U. S. Exhibit 29 for identification.

(Testimony of James Cernusca.)

The witness was shown a check headed "Mally's Grill, V. M. Lewis", dated December 14, 1943, to the Francisco Distributing Company, for \$2,000.00.

(The Witness Continuing):

I have seen that document before. I got this check from Mr. Lewis, and that is the check I gave the salesman. I also got from Mr. Lewis the check shown me entitled "Mally's Grill, V. M. Lewis" December 30, 1943 to the Francisco Distributing Company for \$450. The check dated December 14 was marked U. S. Exhibit 30 for identification, and the check dated December 30 was marked U. S. Exhibit 31 for identification. The check for \$2,000 dated December 14, marked U. S. Exhibit 31 for identification was given to the man who said he was a [278] salesman at the same time that the Vukota check for \$2,000 was given to him. Both of these checks were given at the same time. I gave Government's Exhibit for identification No. 29 and Government's Exhibit for identification No. 30 each for \$450 to the man who said he was the salesman at the same time. I gave that man the two \$450 checks on Townsend Street, near the Clark Draying Company. At the time I gave him the check I gave him \$6,100 in cash. We drove up Third Street, stopped for a while, and then, from there we came down to Townsend Street. I couldn't very clearly say what I was talking about at that time. I had a conversation the time I stopped on Third Street that day as to where the

(Testimony of James Cernusco.)

whiskey was, and he said it was in the San Francisco Warehouse.

Q. ~~And what did you say to that?~~

Mr. Riordan: I object to this on the ground it is hearsay as to the defendant Blumenthal. It is completely hearsay as to him.

Mr. Duane: We also object on the ground it is hearsay as to the defendant Goldsmith, some unidentified person with whom this witness talked. Certainly such testimony is hearsay.

The Court: Is there any connection, counsel, between these checks and the account record of the Francisco Distributing Company?

Mr. Colvin: Oh, yes.

The Court: Do you propose to tie that in?

Mr. Colvin: I propose to tie that in and bring the actual account records of the Francisco Distributing Company here, that is, their bank records which show the corresponding entries.

The Court: You wish this witness to testify as to a conversation with respect to these transactions in the whiskey? [279]

Mr. Colvin: Yes, your Honor.

The Court: I will overrule the objection and you may have an exception, counsel.

Mr. Duane: Exception.

Mr. Friedman: I understand that is limited to the defendant Goldsmith.

The Court: To the defendant Francisco Distributing Company—to the defendant Goldsmith.

(Testimony of James Cernusco.)

(The Witness Continuing):

Well, he says the San Francisco Warehouse. So we drove up the street, Third Street, and like I said, we stopped the car on Third Street between Mission and Market, and then from there we drove around and came back to Townsend Street, which the San Francisco Warehouse is right around the corner from Third Street, and then we went and seen that the whiskey was there, which it was, and from there on he said, 'Here is the bills for the whiskey,' and he wanted the money. So there we went back in the car, gave him the money, and he gave me the bill of ladings, I think they were, or bills of whiskey—I don't know what they were.

The Court: Q. You said you went to see if the whiskey was there?

A. He said it was in the San Francisco Warehouse; he had to get some bill of ladings, some receipts for the whiskey.

Mr. Colvin: Q. Did he tell you he had to stop on Third Street to get those?

Mr. Riordan: I object to that as leading, your Honor, putting words into the witness' mouth.

The Court: Where did he say he was getting the whiskey?

This invoice entitled "Francisco Distributing Company No. 10143" is the invoice he gave me at that time. [280] At that time he gave me this invoice Francisco Distributing Company 10144. These are the ones he gave me on Townsend Street.

(Testimony of James Cernusco.)

When we stopped on Townsend Street that was the first time they were in my possession.

Invoice 10143 was marked U. S. Exhibit 32 for identification, and invoice 10144 was marked U. S. Exhibit 33 for identification. The next day I went to Livermore and gave Government's Exhibit 32 to Mr. Vukota. The next day I gave Mr. Lewis his invoice in Livermore. I do not know Harry Blumenthal. When I stopped on Third Street the man I was with who said he was salesman for the Francisco Distributing Company had left our automobile. He just crossed the street to the left side, going up Third Street, which would be going up toward Market on the left-hand side. I didn't notice him when he came back. I didn't see him come across the street. After I had the conversation outside the warehouse on Townsend Street, I went into the warehouse. The other man and I walked together. When we entered the warehouse, I just asked him if there was some whiskey here for Mr. Vukota and Mr. Lewis. When will it be delivered? He just said, "It will be delivered in a few days". I asked the clerk there at the San Francisco Warehouse. I do not know his name—it was a woman who was there.

Cross-Examination

By Mr. Riordan:

The defendant Blumenthal, at the request of his counsel, stood up.

The Witness: I do not know this gentleman (re-

(Testimony of James Cernusco.)

ferring to the defendant Blumenthal). I never did any Old Rocking Chair business with him. [281]

JOHN E. VUKOTA

called on behalf of the Government, and being first duly sworn, testified on direct examination by Mr. Colvin:

I have a tavern business and a liquor license at 1079 First Street, Livermore, California. I was engaged in that business in December, 1943, and January, 1944. At that time, I purchased some Old Mr. Boston Rocking Chair Whiskey. Government's Exhibit No. 28, for identification, which is a check to the Francisco Distributing Company for \$2,000 is my check which I wrote myself. I gave this check to James Cernusco about the middle of December.

Government's Exhibit for identification No. 29 which is a check for \$450. to Francisco Distributing Company is my check, and that is my signature that appears thereon. I wrote that check which was the end of December, and I gave it to James Cernusco. At the time I gave Mr. Cernusco the check for \$450 I gave him \$3,050 in cash. After that time I received a shipment of Old Mr. Boston Rocking Chair Whiskey. Government's Exhibit for identification No. 32 is an invoice to me which I received from Mr. James Cernusco about the first week in January. The whiskey arrived about

(Testimony of John E. Vukota.)

a day or so after I got that invoice, about the first week in January of 1944. One hundred cases of Old Mr. Boston Rocking Chair Whiskey arrived. Those were fifths. In response to a question by Mr. Friedman, the Court stated that the testimony of this witness was limited as was the testimony of Cermusco, because it pertained to the same thing.

V. M. LEWIS

called as a witness on behalf of the Government, and having been first duly sworn, testified: [282]

I run a restaurant and a tavern named "Mally's Grill" located at 1141 First Street, Livermore, and I was occupied in that business during the months of December, 1943, and January, 1944. I purchased 100 cases in fifths of Old Mr. Boston Rocking Chair Whiskey during that time.

Government's for identification No. 31, a check for Francisco Distributing Company for \$2,000 is my check, and that is my signature which appears thereon. I wrote that check December 14, 1943 and gave it to James Cermusco just after it was written.

Government's for identification No. 30, which is a check to Francisco Distributing Company for \$450 is my check, and that is my signature which appears thereon, and I gave it after I wrote it to James Cermusco, approximately December 30, 1943. At the time I gave Mr. Cermusco that check, I gave him \$3,050 in cash. Subsequent to that time,

(Testimony of V. M. Lewis.)

I received a shipment of Old Mr. Boston Rocking Chair Whiskey. It arrived in the early part of January. There were 100 cases, and those were cases of fifths. I received the invoice marked Government's for identification No. 33 the early part of January. I don't know the exact date but it was a date before the time the whiskey arrived.

In response to a question by Mr. Friedman, the Court stated the testimony of the witness was limited in like manner as was the testimony of the Witness Cernusco.

NORMAN REINBURG

Recalled, testified:

The check with the stub stapled thereto entitled "90-154" made out to the Francisco Distributing Company for [283] \$2,450 is my check, and that is my signature which appears thereon. I gave that check after I wrote it to Mr. Abel. That check was made out at Mr. Abel's direction.

The check was marked U. S. Exhibit 34 for identification.

This check, dated December 24, 1943, to the Francisco Distributing Company for \$2,450 with a stub attached thereto is my check, and the signature that appears thereon is mine. I gave that check, upon making it out, to Mr. Abel, at Mr. Abel's direction.

In response to questions by counsel, the Court stated that the documents were received in evi-

(Testimony of Norman Reinburg.)

dence as against the defendant Abel, and the same were marked U. S. Exhibits 34 and 35 in evidence, and were later re-marked Defendant Abel's Exhibits A and B.

(The Witness Continuing):

These two identified documents 34 and 35 came back to me in the regular course of business. The stubs are also part of the records of my business and were made out at the same time that the checks were made out in each instance.

Counsel for the defendant Abel called attention to the fact that on the back of each of the checks was the following: "Pay to the Order of the Bank of America", and stamped "Francisco Distributing Company 122-Tenth Street, San Francisco".

Cross Examination

By Mr. Wolff:

When I say that I made out that check at the direction of Mr. Abel, I mean that I made it out in payment for the whiskey I was purchasing. Mr. Abel did not give me any personal directions how to write it or what to do about it. [284] He said "Francisco Distributing Company, \$2,450", and I did. He told me that was where I was getting the whiskey. I know a man by the name of Bob Davis and a man by the name of Louis Diamond. I acquired the place of business which I called "Dopey Norman's" in 1939. I have lived in Vallejo since 1919. I have known Bob Davis and Louis Diamond a good many years, Bob Davis I would

(Testimony of Norman Reinburg.)

say, six or seven years. I don't know Mr. Diamond very well. He is a customer. He comes in my place. He has a drink once in a while. His personal problems I don't know anything about. I know neither of them personally. They are good business friends. I would say I have known Mr. Diamond two and a half years. Bob Davis is just a nice old man, a pretty nice old fellow, treats everybody nice, everybody likes him, including myself. He has been in business a good many years. He has a pawn shop and jewelry shop. I guess Louis Diamond is one of his employees. He is in the store at all times. Louis Abel worked there for a while. It seems to me Mr. Abel had been in Vallejo prior to the time I met him and discussed this subject-matter with him about two or three months. During that period of time, he was working for Bob Davis. Whether he is working there or not—he is in and out of the place quite often. He was behind the counter on several occasions. Subsequently, Louis Abel opened up his own place of business. His pawn shop was built there in my building and he moved into the pawn shop on February 15, 1944. He leased a place for five years in my building, and he and I became very friendly. His problems and Mr. Davis' never entered in my business, and I don't know how long he had known Mr. Davis, or anybody else. He opened up a pawn shop and jewelry store. We were pretty good friends. I don't know what you would call "pretty good friends". We were business friends by a sale.

(Testimony of Norman Reinburg.)

A man comes in my place and out, and so forth. He is [285] around the street all the time. I testified yesterday that, in addition to this check, I gave him some cash, I guess twenty dollar bills. Some fifties were in there. It all amounted to enough to pay the bill, and the total amount of the cash was \$4,050 in each case, and in each case there were only bills, no gold, no silver. The largest denomination was \$50. I gave the money to him at 124 Georgia Street. That is my home. I live there, that is my place of business. It is my home when the doors are closed, and it is a saloon when the doors are open. I occasionally meet Mr. Davis and Mr. Diamond on the street and say "Hello", or if they are in the restaurant, I talk to them if they happen to be sitting next to me. I never went to Mr. Davis' place of business unless I had to buy something. At the time I was in Mr. Davis' place of business, I bought a ring from him. I have been in there several times. I don't know whether Mr. Davis was in business in Vallejo before I came there. I came to Vallejo for the first time in 1919. I don't know where Bob Davis was then. The first I knew him was six or seven years ago. I gave this cash in the denominations I have indicated to Mr. Abel at my place of business or home about December 13, or 14, 1943. It was in the early part of December, and I gave the money on the first occasion. I never gave Mr. Abel any other money or check of any sort or character other than the two checks now in evidence of \$2,450 a piece.

(Testimony of Norman Reinburg.)

and this \$4,050 cash in the denominations of fifty and twenty dollar bills. That is all I ever gave him for the purpose of acquiring for me this liquor that I have mentioned. I did not give both checks and cash at the same time. There was 25 days difference there. The first time I gave a check for \$2,450 to Mr. Abel was around the first part of December, 1943. I didn't give him any cash the first time, and gave the man a check. The first time I gave him [286] \$2,450 in a check about December 13, 1943. At that time I did not give him any cash. I gave him a check for \$2,450 around December 26th or 27th, 1943, the second time at my place of business. It was not at that second time that I gave him the cash. I never gave him the cash only on two occasions. I have already mentioned. I gave him the cash when I received the bill showing the whiskey was slated to be sent to my address. The whiskey was delivered to me by some of the draying companies.

Exhibits 22 and 23 for identification refresh my memory as to when I gave the cash to Mr. Abel when he gave me this. I gave him the cash in each instance, which was the middle of December; the other was in January. I gave Mr. Abel one check for \$2,450 about the 13th of December, 1943, and I gave the second check for \$2,450 to Mr. Abel about the 26th day of December, 1943. I should say I got the first load of whiskey in time for Christmas, and I got the second load of whiskey on after New Year's, and after the man got the

(Testimony of Norman Reinburg.)

cash, the whiskey was delivered about four days later in each case. The first came about December 25th, approximately. It came in time for the Christmas Holidays. When I got the first 100 cases of whiskey, I gave Mr. Abel the \$4,050.

The second delivery of whiskey was made right after New Year's January 3d or 4th, along in there. I gave him cash when he gave me the bill—right after New Year's. The cash I say I gave him in denominations of bills of \$50 and \$20 was given to him, \$4,050, on or about January 4, 1944. Prior to that time I had not given him any cash of any kind. I gave him cash twice. I got two hundred cases of whiskey, there were a hundred cases about 25 days apart. I gave him cash the first time when he gave me the bill. I gave him the [287] first check about December 13, 1943, and I gave him cash the first time about December 17, 1943. I gave him \$4,050. The same thing repeated itself after New Year's. I gave him \$4,050 about January 4. The bills that I used in my business is what he got. I reached in the safe and got them. I never at any time gave any cash or made any payment in any form for any of this whiskey to Bob Davis, or to Fred Diamond. I have never given them any payment of any kind for anything.

Redirect Examination

By Mr. Colvin:

I was anxious to have whiskey, and there must less three was an invoice. I wouldn't expect any whiskey unless there was an invoice. I wanted to

(Testimony of Norman Reinburg.)

be sure I was dealing with a legitimate house, a legitimate distributor. You can buy whiskey off a truck on the street or anything like that. I wanted to buy the whiskey through a legitimate place of business.

HENRY L. TAYLOR

Called as a witness by the Government, and being duly sworn, testified as follows:

Direct Examination

By Mr. Colvin:

I am in the contracting business in Shasta County, and I also have "Ponty's" pool place, with Mr. Humes. I operated that Ponty's Place during December 1943 and January 1944. I was operating that as a liquor establishment, there is a bar there for which I hold the license, and that license was issued to both Mr. Humes and myself. During the month of December 1944 I made a purchase of Old Mr. Boston Rocking Chair Whiskey [288] from Mr. Feigenbaum. I see Mr. Feigenbaum here in the courtroom—the gentleman with the dark suit with his hand against his face.

(Thereupon, at the request of the court, the defendant Feigenbaum stood up.)

The Witness: (Continuing) That is the gentleman I am referring to. I bought this whiskey from

(Testimony of Henry L. Taylor.)

Mr. Feigenbaum in the early part of December in a drug store on Mission Street.

The Court stated that the record would show that this evidence was being offered only as to the defendant Feigenbaum.

The Witness: (Continuing) I had a conversation with Mr. Feigenbaum. That conversation took place at the drugstore which I have mentioned. Beside Mr. Feigenbaum and myself, my wife and Mr. Humes were present, and there were two other parties there.

Q. What was that conversation, regarding the purchase of whiskey?

Mr. Friedman: We object to that on the ground it is incompetent, irrelevant, and immaterial, the corpus delicti of the charge in this indictment has not been laid, and until the corpus delicti is established any acts, declarations or statements of a defendant or alleged co-conspirator are inadmissible.

The Court: I will overrule the objection. He is asking for a conversation as to the purchase of the liquor.

Mr. Friedman: Exception.

The Witness: (Continuing) I don't recall what Mr. Feigenbaum said. I do not recall the exact words.

(To the Court): I bought some whiskey from this man. We went out there to buy this whiskey, and he told us how much it was. We gave him a \$500 deposit prior to that, [289] and he said if we

(Testimony of Henry L. Taylor.)

hadn't shown up, why, we would have lost that \$500. We went out into this man's place of business, and I had a talk with him. He said he would give us the whiskey. He did not tell me what kind of whiskey at that time. He told me the price would be \$64.00. We said we would take it. He wanted us to take 200 cases. So we finally thought we would take 200 cases. So we took 100 cases instead of the 200. At the beginning of the conversation, I told Mr. Feigenbaum we would take 100 cases. He wanted us to take 200 cases. I told him we would if we could afford it. We finally made a deal for the 100 cases. He had us to make out a check to the Francisco Distributing Co. for \$4900. That conversation took place on December 9 at the Sunset Drug Store on Mission Street, San Francisco, around 21st Street. A gentleman by the name of "Little Joe," and another fellow by the name of Tucker, were present beside Mr. Feigenbaum, Mr. Humes, and myself. We were introduced to Mr. Feigenbaum, and he said it was lucky we came down, or we would have forfeited the 500. We said we were anxious to come down and save our \$500, and we was anxious to get the whiskey. We told him we were from Cottonwood, Shasta County. Mr. Humes and myself were introduced to Mr. Feigenbaum by this man "Little Joe." He said he would get us the whiskey and the price was \$64, and he had us make a check to the Francisco Distributing Company. That was per case for 100 cases. We told him we would take 200 if we could.

(Testimony of Henry L. Taylor.)

If I couldn't, why he would take the 100; he would keep the other 100. He wanted to bill 200 cases against our license. He said he could take the other 100 if we didn't take it. He said he would run it in on our license. He had me make him out a check; that is, I had to go out and get my wife at the car, and she came in and made the check to Mr. Feigenbaum. I had left her at the car outside. Mr. Feigenbaum instructed my wife how to make the check out. [290] The check shown me, entitled, "R. M. and H. L. Taylor, Pay to the order of Francisco Distributing Company, \$4900," is the check my wife made out at that time. It was written and signed by Mrs. Ruth Taylor in my presence. He instructed her to make it to the Francisco Distributing Company for \$4900.

The said check was marked for identification as U. S. Exhibit 34.

The Witness: (Continuing) She made the check out for \$4900, and he had us give him \$1,050 in cash. I gave the money to Mr. Feigenbaum. We discussed the 200 cases and finally we took the 100 cases. It was finally said if we did not take the 200 cases he would take the other 100 cases. I do not think anything else was said at that time and place in that conversation. On the 1st of December I gave \$500 to Little Joe. It was on some street the other side of town. We met him at some bar over there. It was beyond Market Street, over around Turk or somewhere over in there. I had a conversation with the man to whom I gave the check,

(Testimony of Henry L. Taylor.)

which took place on the street in front of this bar. Beside myself and Little Joe, Mr. Humes and this man Tucker were present.

Q. What was the conversation?

Counsel for the defendant Feigenbaum objected upon the ground that the conversation was not binding on the defendant Feigenbaum because it was a conversation occurring out of his presence.

The Court overruled the objection, to which ruling counsel for the defendant Feigenbaum then and there duly excepted.

The Witness: In that conversation Little Joe said he [291] could get us some whiskey, and we said we would take it. We said we would give him a deposit of \$500 and he would make a deal, getting us the whiskey. At that time he did not tell us what kind of whiskey it was. There was 100 cases mentioned at the time. We gave him the \$500 on the street, and he agreed to get this whiskey in about a week's time. That was all of the conversation at that time and place. After that conversation Mr. Humes and I went back to Shasta County—Cottonwood. Mrs. Taylor had not been down with me at that time.

I next came to San Francisco on the 9th and 10th of December, when we met Mr. Feigenbaum. My wife and Mr. Humes were with me. I located Little Joe at that time; we met him at the bar on the street. I believe it was "Little Joe's Place," if I am not mistaken. I went to the Sunset Drug Company and held a conversation with Mr. Feigen-

(Testimony of Henry L. Taylor.)

baum, the same day that I met Little Joe on my return from Cottonwood. I imagine it was around about mid-day, about noon time. When I met Little Joe, Mr. Humes and myself and Mrs. Taylor and the man Tucker were present. Then all of us proceeded to the Sunset Drug Company; that is my testimony. After the conversation on the 9th of December at the Sunset Drug Company we went back to Shasta County. I next returned to San Francisco on December 23, on my way to Los Angeles with my wife. I visited the Sunset Drug Company. I had a conversation with Mr. Feigenbaum on that day at the Sunset Drug Company. My wife was not with me during that conversation. Only Mr. Feigenbaum and myself were present.

Q. What conversation did you have with Mr. Feigenbaum on that date regarding the whiskey?

Mr. Friedman: I will object to that on the ground it is incompetent, irrelevant and immaterial; the proper foundation is not laid. We have no proof of the corpus delicti, or [292] fact, and act, statement or declaration of an alleged co-conspirator—

The Court: "Objection Overruled, Exception Noted."

The Witness (continuing): I had a conversation with him. I asked him, "Where is our whiskey?" We were worried about it. We hadn't heard anything from this liquor. So he told us it would be in soon, and it would be shipped to us. At that

(Testimony of Henry L. Taylor.)

time he told me the name of the whiskey was the Old Rocking Chair, and he showed me a bottle he had in his desk drawer. That was a fifth. I did not open the bottle there. I asked him what kind of whiskey it was, and how good it was, and I made a deal with him then to buy a case of whiskey to take down to Los Angeles with me. That was in addition to the other purchases. I paid him \$64 for that case in cash. I told him I would take the 100 cases, and he wrote a check out to me, H. L. Taylor, and I endorsed it back to him. He wrote a check to me for \$2450. He asked me to endorse that so that would put him in the clear.

(To the Court): That would give us, instead of taking 200 cases, which we were billed for, the \$4900. That would give us just the 100 cases for \$64 a case, so he wrote the check for \$2450, and had me endorse it back to him. He signed that check in my presence. I did not receive any cash for it when I endorsed it. I told him I had to be going, I was going to Los Angeles, and we wanted to get our whiskey as quick as we could. We gave him instructions previous to that. I had no subsequent dealings with him.

Cross Examination

By Mr. Friedman:

I saw Mr. Feigenbaum twice. I first came to San Francisco [293] as far as this transaction is concerned on December first. I and my wife and my

(Testimony of Henry L. Taylor.)

partner came down. That is not right. On the first trip Mr. Humes and I came. The first trip I came down here to get some whiskey. I saw a man by the name of Little Joe on that occasion. I never saw him before. I also met a man named Tucker. I had not known the man named Tucker before. I had a conversation with Little Joe, and Mr. Tucker. I met them together in Little Joe's bar or saloon. We were looking for whiskey, and he said he could get some whiskey. I said to him I was looking for some whiskey; he would see if he could get us some whiskey. I asked Little Joe or Mr. Tucker to see if they could get me some whiskey. They said they could get us some whiskey. I did not ask them where. They wouldn't tell us. I said to them I wanted to know where it was at. They wouldn't tell us where it was at. They simply said they would get me some whiskey. I told them we would take 100 cases. They asked how many we would take. We told them we would take 100 cases. They mentioned the price. They said it would cost Mr. Humes and I \$64. I asked them what kind of whiskey it was. They did not tell us what the name was, but it would be 80.6 proof. That is what they told us. They did not tell me whether it would be straight or blend. I did not ask. I have not been in the saloon business very long. We bought the place August 17, a year ago, —a year ago last August. I had only been in this particular kind of business two or three months. Mr. Humes had been in the business more than

(Testimony of Henry L. Taylor.)

that; about 6 months, I imagine. Neither Mr. Humes nor I knew very much about it. They wanted us to give them the money and to make a deposit on it, and they asked us for \$500, and I gave them \$500. [294]

That is what they got the \$500 for. They did not tell me they wanted \$500 in order to get some whiskey for me. They said they had to have a deposit on it. They said they had to make a deposit on it, and I was to give them \$500. I asked them if I was going to get the \$500 back if I did not get the whiskey; they said if we didn't make the deal, we would get the \$500 back. They told me if they couldn't make the deal for me, I would get my \$500 back. I paid for this in cash, five one hundred dollar bills. I did not have any other talk with them on that day. We just talked about the whiskey, then I went back to Shasta County. I came back the 9th of December. Mr. Tucker and Little Joe told us to come back in a week or ten days, and I came back. I found Little Joe and Mr. Tucker together again. I imagine it was in Little Joe's place. I won't say whether it was his place or not, but I think it was. That is the time when they took us to the drugstore on Mission Street, and that is the first occasion on which I met Mr. Feigenbaum. When I arrived at the drugstore, my partner, Tucker, Little Joe and I went into the drugstore. My wife remained in the car. When we first came into the drugstore and saw Mr. Feigenbaum, Little Joe introduced us to Mr. Feigenbaum.

(Testimony of Henry L. Taylor.)

He said we was the ones that had the \$500 for that whiskey. Little Joe said "These are the people who put up the \$500 for the whiskey". He said it was a good thing we got in there, or we would have lost our deposit. I told them I couldn't afford to lose \$500. We did discuss our understanding that I would get the \$500 back if I did not get the whiskey. I believe both Mr. Humes and I made that statement. Mr. Feigenbaum said we would get the \$500 back if we didn't get the whiskey. Then he instructed us to get the whiskey, and for us to make out our check, so I walked out, brought back my wife, and he instructed her how to make [295] out the check. There was no discussion about how much whiskey we were going to get, how much it was going to cost us, until after the check was made out. He wanted us to take 200 cases. He said he could get us 200 cases. He did not say he had 200 cases he would sell us. He did not say that. I did not ask him where he was going to get the whiskey from at any time because it was not supposed to be shipped in yet. It hadn't been unloaded from the car yet. We asked him where it was coming from, but he didn't tell us. He wouldn't tell us what the brand was. I wouldn't recall that I asked him. He said "Take 200 cases", and he wanted our license number. We brought him our license number down so we could have the cases charged to our license. In my operations under a California Liquor License or Federal Liquor License, I have to keep track of how much

(Testimony of Henry L. Taylor.)

whiskey I buy. He told me he would like to have those 200 cases registered or recorded under our license. We told him we would take the 100 cases. This was the first time I saw him. I said I would take 100 cases. Then he told me to make out a check, that is when I went out to get Mrs. Taylor. He instructed Mrs. Taylor to make the check out for \$4,900, and there was something said in that conversation about the fact that we might take 200 cases. We said we might take 200 cases if we could handle it, and if we did not take the 200 cases, why he would take the 100 cases himself. Mr. Feigenbaum mentioned the amount that this check was to be made out in. He said to make the check out for \$4,900. He did not ask why it should be made out for \$4,900. I did not ask why it should not be made out for \$6,400.

Q. Did you ask why it should not be made out for \$5,900?

A. That wasn't mentioned, no \$5,900. I had already paid \$500 according to my understanding. That was to cost [296] us \$6,400 altogether. That was understood in the first beginning.

Q. So there was nothing said as to why you should make out the check to the San Francisco Distributing Company for \$4,900?

A. That was the distributor he was dealing with. Then Mrs. Taylor made out the check, and we went back to Shasta County, leaving the check and \$1,050. He told us to pay him \$1,050 in cash, of which he had \$500. He didn't tell me why I should

(Testimony of Henry L. Taylor.)

pay that in cash. We never asked him why. We never asked him "Why can't I or Mrs. Taylor make out the check for the whole business?" I didn't get a receipt for the \$1,050. My wife asked for a receipt for the check, for the \$4,900. I did not get one. My wife did not get one. He told her the check would be a receipt. Nobody, my wife, nor my partner, nor I asked for a receipt for the \$1,050. I received nothing to show that I paid \$1,050 in cash. I asked when I was going to get the whiskey. He told us in a few days it would be unloaded. We wanted to get it right away, and we would haul it ourselves. He said it would be shipped by truck or freight, and charged us \$50 for shipping. We gave him \$50. That accounts for the odd \$50 for the cash that was paid. I came back again on the 23rd. On that trip I did not get to see Little Joe or Mr. Tucker; I went right to Mr. Feigenbaum. My wife and I were on our way to Los Angeles. I had not received any whiskey as yet. So I went to see Mr. Feigenbaum. It was in the evening in the drugstore. His clerks were in there, but he and I talked this by ourselves. My wife did not come in. I wanted to know where the whiskey was and when we were going to get it. He said it would be unloaded in a few days; we would be getting it in a few days. He asked me to write the check out, sign it and endorse it to him. [297] I told him I couldn't take the 200 cases. I could only take the 100 cases. Mr. Feigenbaum said all right, he wanted me to

(Testimony of Henry L. Taylor.)

take the 200 cases. He still wanted me to have the 200 cases and I refused. Then Mr. Feigenbaum wrote out a check to me, and told me to sign it. He wanted me to sign the check so he could have the check back again. He didn't tell me the exact why. That was for the other 100 cases that we made the deposit on. He was supposed to run that back to us which I endorsed the check and gave it back to him. The check for \$4,900 which I gave was a deposit on the 200 cases at first if we could take them. The \$4,900 was a deposit or an order for the Francisco Distributing Company for 200 cases of whiskey. On the second visit at the drug-store on the 23rd, he told me he was going to take the other 100 cases if we didn't take them, and I said I was not going to take it. He wrote me out a check which I made the deposit and he gave me that check to sign back to him. I couldn't say that he told me that, as I had already put up a deposit for the 200 cases. He wanted his records to show that I put up a deposit for half of that. He did not tell me that to my knowledge I was signing this check to clear him so he could get his money which we were paying him, \$6,400 for the cases of whiskey, or the \$6,400 for the 100 cases of whiskey. By "clear him to get his money", I mean it wasn't to clear his money, it was to clear his records. I had already put up \$6,950. That paid for my 100 cases of whiskey. If we had taken the other 100 cases which he wanted us to take, it would have cost us more, but we didn't want

(Testimony of Henry L. Taylor.)

the other 100 cases; it was too much money. It would cost us another \$6,400. He wanted me to sign the check, and he wrote the check out, and I signed the check for him. What his purpose was, I don't know what he wanted to do with the check. I simply endorsed the check [298] showing I had received \$2,450 for no reason that I know of. After I endorsed this check, he showed me a bottle of whiskey, and I bought another case of whiskey from him and went to Los Angeles. That is the first time I heard the brand mentioned. He showed me the bottle. I am not very much a drinking man. I drink some. I asked what kind of whiskey it was. I asked him if it was any good. I did not ask him to be given a drink of it to find out whether it was or not. He did not offer me any, but he showed me a bottle, and then I asked if I could have a case to take with me to Los Angeles. He had a case there, and had his man put a case in my car, and I paid him \$64 in cash. Then, my wife and I drove away. I did not see Mr. Feigenbaum again. I eventually got my 100 cases of whiskey. That is my signature on the reverse side of the paper now shown me.

The document was marked Defendant Feigenbaum's Exhibit "A" for identification.

(The Witness continuing):

At first we agreed to take 200 cases of whiskey. We dealt on 200 cases. It was on the 23rd that I changed that original agreement.

In response to questions by counsel, the Court stated that the testimony of the next witness would be received against the defendant Feigenbaum.

RUTH TAYLOR

called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

My home is in Cottonwood, California. I am a housewife, and my husband is Mr. Taylor, the witness who just [299] testified. I have seen this check to Francisco Distributing Company for \$4,900 now shown me. That is my check, and that is my signature that appears thereon. I wrote that check myself on December 9, 1943 in the Sunset Drugstore in the rear of the drugstore. At that time, my husband, Mr. Humes and Mr. Feigenbaum, and a man named Mr. Tucker, and another fellow they call Little Joe were present. I wrote that check at Mr. Feigenbaum's instructions. He told me to whom to make the check payable. He told me the amount for which I was to write the check. I did not witness the payment in cash of any money to Mr. Feigenbaum on that occasion. I had given my husband the money, but didn't see him present it to Mr. Feigenbaum. At that time, I had given my husband a certain amount of cash after he had parked in front of the drugstore. (here) \$1,000 in hundred dollar and fifty dollar bills. I happened to have the cash with me, and

(Testimony of Ruth Taylor.)

I gave it to him. There was a discussion about writing the check.

Q. What was that discussion?

Mr. Friedman objected to the question on the ground that it was immaterial and irrelevant as against the defendant Feigenbaum, and that it called for acts, declarations and transactions participated in and performed by defendant Feigenbaum when the substance of the offense charged had not yet been established.

The Court overruled the objection, to which counsel for the defendant Feigenbaum duly Excepted.

(The Witness continuing):

Mr. Feigenbaum told me to make it out to the Francisco Distributing Company for \$4,900. I asked if we would get a receipt for it, and he said the check would answer as a receipt. I did not have any other discussion. I didn't [300] hear any of the transactions of the persons present except I wrote out a check for that amount of money and asked for a receipt, and he said the check would act as a receipt. I left after I wrote the check and went back to the car, and Mr. Taylor came back for the money after I got back to the car. It was after I returned to the car and after I had written the check that Mr. Taylor came out. It was at that time I gave him the cash, and he returned to the Sunset Drugstore. I never witnessed the arrival of any Old Mr. Boston Rocking Chair to the Cottonwood Ponty's.

RAYMOND C. HUMES

called as a witness by the Government, having been first duly sworn, testified as follows:

My home is in Cottonwood, where I have lived about six years. I have a saloon there, with Mr. Taylor. The name of the saloon is Ponty's Place. I operate it as a partnership with Mr. Taylor. I have a retail license there. I was in that business during the month of December, 1943. During that month, I made a trip to San Francisco around the first of December. I traveled to San Francisco with Mr. Taylor to see if we could get some whiskey. We went out to Hart's first, out to the distributor there, but we couldn't get any there, so we came back to a saloon over here on Larkin Street. We were in there having a drink, talking about it and ran into a fellow named Tucker, and he got talking to us about this whiskey. Mr. Taylor was with me at that time. Then Mr. Tucker took us down to see another fellow by the name of Little Joe. Mr. Taylor went with us. I am sure there was another fellow present, but I wouldn't know his name. I am not very familiar with the streets but it was on the other side of Market Street from this post office building that we had the discussion. Mr. Tucker took us down to see Little Joe [301] and we asked him about the whiskey, whether we could get any whiskey, and he said he thought we could. We told him what we was down here for was whiskey. He said he thought he could get us some, but we would have to put up a deposit,

(Testimony of Raymond C. Humes.)

he said \$500 in order to. He asked us how much, and we said we could handle 100 cases. He did not tell us what kind of whiskey he could get for us. He wanted to know where we could get that whiskey, or where he was going to take us to, and he said we would have to leave that up to him. He said it would cost around \$64. That was about all that was said. Mr. Taylor gave Little Joe \$500. He said that if we didn't get the whiskey, we could get our \$500 back again. He said, "You come back in a week", and then he thought he could fix us up. I think that was all the discussion with Little Joe then or with Mr. Tucker. Subsequent to that conversation, we returned to Cottonwood. Mr. Taylor went back with us. He accompanied us, so after that, Mr. Taylor, his wife, and I traveled back to San Francisco. We found Little Joe and Tucker on that occasion. We found Mr. Tucker first. He took us down to Little Joe. I had a discussion then at Little Joe's. That was around the 8th or 9th of the month. Later on that date, we went to the Sunset Drug Store. Little Joe introduced us to Mr. Feigenbaum. I see Mr. Feigenbaum here in the court room. (Here the witness pointed out the defendant Feigenbaum.) Mrs. Taylor was in the car with us. She did not go into the drugstore with us. Little Joe took Mr. Taylor and myself in and Tucker went in, too. We had a conversation with Feigenbaum at that time. The four persons that I have named who went into the drugstore and Mr. Feigenbaum were the par-

(Testimony of Raymond C. Humes.)

ticipants in that conversation. There was a clerk in there. He seemed to be busy. There were two or three people in there working back and forth. They were [302] in the forepart of the drugstore.

Q. What was that conversation you had with Mr. Feigenbaum?

Mr. Friedman objected to the question upon the ground that it called for the act or declaration of payment on the part of an alleged co-conspirator in the case, and that there had been no proof of the corpus delicti.

The court overruled the said objection, to which counsel for the defendant Feigenbaum duly Excepted.

(The Witness continuing):

We were introduced to Mr. Feigenbaum by Little Joe and Mr. Feigenbaum wanted to know what we would have, and we told him we wanted 100 cases of whiskey. He said, "Yes, I think I can get it for you". Nothing was said about the deposit right at that time. He said he would get us 100 cases of whiskey, and he would have to have a check for it for \$24.50 a case. He told us that the whiskey would cost us altogether \$64 per case. It was then that I had the discussion about the \$500 I had paid. He said it was a good thing we got down on that date or we would have forfeited the \$500. Mr. Feigenbaum said that. We had a conversation then about the number of cases we were going to take. We were talking about 100 and Feigenbaum wanted to know if we couldn't take 200. I thought

(Testimony of Raymond C. Humes.)

it was a little too steep for myself and I said that. Then, Mr. Taylor and him and I got talking about how we could use the 200 so we were to make out the check for 200 cases, which was \$4,900. The check for \$4,900 was made out after our statement that maybe, we could take 200. We asked him about the whiskey, if we could take the whiskey up on a truck with us to Cottonwood. He said the whiskey wasn't in. He said it [303] would be about a week or ten days, that the whiskey would come in on a car, and that they would send it up by truck. If not, we would receive it by freight. We asked him where the distributor was, and he didn't say. He asked fifty cents a case to pay for the freight. He was paid an amount of money for the freight in addition to the \$500 deposit and the check for \$4,900. He was paid the further amount of \$1,050. Mr. Taylor paid that money to Mr. Feigenbaum in my presence. Mr. Feigenbaum then said he wanted a check for \$24.50. He said that went to the distributor. He said we would have to come through with \$1,050 in cash. I think that is about all the discussion at that time. I have seen the invoice of the San Francisco Distributing Company No. 10091. It came by mail in Cottonwood. That has been kept as part of my records in the operation of my business. Those records are kept by myself. I received 100 cases of Old Mr. Boston Rocking Chair Whiskey by freight. Those were cases of fifths. I unpacked them my-

(Testimony of Raymond C. Humes.)

self. I checked the number. The number was 100 cases.

Thereupon, the invoice referred to was marked U. S. Exhibit 35 for identification.

(The Witness continuing):

In my first conversation on or about the first day of December, Little Joe said we would have to have the cash and to bring it in hundred dollar bills. He told me that I would be expected to write a check in addition to the cash. He did not give me any explanation of that. I checked the proof on that whiskey when it came in. It was 80.6 whiskey. I never had any subsequent dealings with Mr. Feigenbaum with respect to the shipment of whiskey. [304]

Cross Examination

By Mr. Friedman:

After December 8th or 9th, we were probably here in San Francisco a couple or three days. I am sure that was my last trip to San Francisco. I went one time into Mr. Feigenbaum's Drugstore. I am almost positive it was just one time. I don't think Mr. Taylor and I went into Mr. Feigenbaum's drugstore after December 9th. It is not a fact that the talk about freight occurred at a later date than the check for \$4,900 was given. My recollection is this all happened at the same time. I don't just remember how this question of fifty cents a case freight came up. It came up

(Testimony of Raymond C. Humes.)

when Mr. Taylor and I suggested that we could take the stuff up to Shasta County ourselves. We were told at that time that the goods were not available for us to take, and that when they were available they would be sent up by truck, or by freight. That is the time that the cost of that came up, the cost of the freight, fifty cents per case. Mr. Feigenbaum said that. On December 9th, after some discussion and reluctance on our part, Mr. Taylor and I agreed to take 200 cases. On the 9th of December we changed that determination. We got to talking it over. We thought we could only handle 100 cases. I told that to Mr. Feigenbaum after the check was written. We wrote the check in anticipation of taking 200 cases. We changed this determination, I think, before the cash had been passed. I am almost positive that the cash was paid on December 9th. I am sure that the cash was passed the same day that the check for \$4,900 was written. Mr. Taylor went out and got the money for Mrs. Taylor. I am sure it was on that day. When I came to this place with Little Joe and Mr. Tucker, that was the first time I ever met Mr. Feigenbaum. That is the last time I ever saw him. On being introduced to him, I don't remember what was the first thing that was said [305] and who said it. Someone must have mentioned the fact that I wanted some whiskey. I could have said it was Mr. Taylor. One or the other said we would like to get some whiskey. Somebody said that Mr. Taylor and I were in the

(Testimony of Raymond C. Humes.)

liquor business. Mr. Feigenbaum said he could get us the whiskey. He asked us how much we wanted. We said 100 cases. Nothing was said about what kind of whiskey, Scotch, or Rye, or Bourbon, or as to the classification or the brand. We did ask him if it was good whiskey. That is all that we were concerned with. Mr. Feigenbaum said it was. Mr. Taylor and I and Mr. Tucker came into Mr. Feigenbaum's drug store. Mr. Tucker introduced us to Mr. Feigenbaum. I can't remember what was said in the introduction. We did not care whether we met Mr. Feigenbaum or not; we were interested in getting some whiskey; that was the thought uppermost in my mind, and Feigenbaum said he could get us some. I do not recollect that Mr. Feigenbaum at that time said "We have some whiskey coming that I can sell you, or let you have". I would say that he did not say it. He said the whiskey wasn't available right then, that it would be in a few days, and a carload of it. Neither Mr. Taylor nor I said "Well, we have already made the deal, we put up a \$500 deposit". I could have said it or Mr. Taylor. It was one or the other. It was said when we had put up a \$500 deposit on the whiskey. When I was introduced to Mr. Feigenbaum, I said to him "We would like to get some whiskey". Little Joe brought up the subject of \$500. We had already put up the \$500, and we were going to get the whiskey. Mr. Feigenbaum was going to get the whiskey for us. Right in this conversation, Little Joe spoke up and said

(Testimony of Raymond C. Humes.)

"These people have already put up the \$500 deposit". He could have said "These are the people who put up the \$500 deposit". I guess the deal had already been made. We came [306] down there to get the \$500 or the whiskey. We came down to see Little Joe or get the \$500 or the whiskey. After we saw Little Joe, he said "I will take you over to Feigenbaum, or some place". So we went along with him. It was not the first thing said in the conversation about the whiskey. It did not come up until some time after Feigenbaum and Taylor and I were talking about the whiskey. Then, something was said about the fact that it was lucky we came in, or we had lost our deposit. Mr. Feigenbaum said it was a good thing we got down on that date, or we would have forfeited the \$500. In response to that, Mr. Taylor or I said we were glad we got there. We did not have any arrangement with Little Joe or Mr. Tucker for paying them anything for getting the whiskey that I know of. I heard they was to get something but I couldn't say what. Mr. Taylor did not tell me that. I did know somewhere along the line that for their assistance in getting us some whiskey Tucker and Little Joe were to be compensated. I did not know that Mr. Tucker and Little Joe were to keep the \$500 that we gave him in order to find somebody that would give Mr. Taylor some good whiskey. I don't remember that when we had our first conversation with Mr. Tucker and Little Joe they said that they could find somebody who would sell us some

(Testimony of Raymond C. Humes.)

whiskey, but it was going to cost Taylor and myself \$500 for them to do so. I would say it did not happen. My understanding was that \$500 was to go as part of the purchase price of the whiskey and not as a commission or bonus to Little Joe or Tucker. Mr. Taylor or I asked Mr. Feigenbaum who was the distributor going to be. He did not tell us. I think he said he couldn't tell us. I don't remember that Mr. Feigenbaum said something to the effect, "Well, that is a secret", "it is no concern of yours as long as I get you the whiskey; that is all you are concerned with". I do not recall anything like that being [307] said. I do recall that he said he couldn't tell us the distributing house or the warehouse. In other words, he told us to make out the check to the Francisco Distributing Company. That was just while we were in there. We were there fifteen or twenty minutes. The whole business took not much more than fifteen or twenty minutes. When he gave directions as to the making out of a check, we knew the distributing company. The talk about the check before Mrs. Taylor was brought from the car was that we would have to have a check for \$4,900. We were told that the check was for whiskey. We were not told anything else about that. Mr. Feigenbaum gave an explanation that it was for the distributor. He didn't say anything else about the distributor, as to how much more they were to get. It is a fact that the check for \$4,900 was to be made out because that was the money the dis-

(Testimony of Raymond C. Humes.)

tributing company was to get for the whiskey, and that the \$4,900 was what the distributing company was to get for 200 cases of whiskey. Then he said we would have to bring in the cash for the balance of it. He said to us, "The balance of it will have to be paid in cash to me". In that conversation, Mr. Feigenbaum told us that for the 200 cases we would have to make out a check for \$4,900, which was what the distributing company was going to get, and the balance of the cash was what he was going to get. That was the way I understood it. Then Mrs. Taylor came in and she was simply told by Feigenbaum to make out a check for Francisco Distributing Company for \$4,900, which she did, and left. After Mrs. Taylor left the drugstore, the next thing discussed was about the rest of the money, the rest of the cash. At that time, Mr. Taylor and I were still dealing on a 200-case basis. That is what Mr. Taylor and I were talking about, and that is when the question of the cash came up. Mr. Feigenbaum at that time told us we would have to have \$1,050 [308] in cash. When Mr. Feigenbaum said we would have to have \$1,050, he said that after Mr. Taylor and I had informed him that we really only wanted to take 100 cases, He told us we would have to have cash, which would be the difference at \$64 a case between the \$4,900 we had paid by check and the \$12,000 the 200 cases would cost. It was when this figure came up that Mr. Taylor and I had the discussion that we had better only take 100 cases. We would have to give

(Testimony of Raymond C. Humes.)

\$7,900 in cash, or about that. That is when we receded from that position and told Mr. Feigenbaum we could really only handle 100 cases so we gave \$1,050 in cash. Mr. Taylor actually delivered it so that made \$4,900, and \$1,000, or \$5,900 for the liquor, plus \$500 I had given to Mr. Tucker, which made \$6,400, and \$50 for freight, and the freight was based on 100 cases, and not 200. I do not recall any time that Mr. Feigenbaum referred to a check that Mr. Taylor and I had to make in December for \$2,450. When I first went into see Mr. Feigenbaum I told him, Mr. Taylor and I, or Mr. Taylor told him, that he and I only wanted 100 cases. I don't remember that at that time Mr. Feigenbaum told us that he would have to have a check for \$2,450 for 100 cases.

Redirect Examination

By Mr. Colvin:

We were told that we would have to have a check for the number of cases at \$24.50 a case. I never was told why we had to pay the remainder in cash. I never asked him if we could pay the balance by check, rather than in cash. We were directed by Mr. Feigenbaum to pay that amount in cash.

FRANK DITO

recalled by the Government testified as follows:

I have certain deposit slips of the Francisco

(Testimony of Frank Dito.)

Distributing Company which are records of the Bank of America at this time. I have the deposit slip of the Francisco Distributing Company for the date December 11, 1943. Being that these are permanent bank records, I had a certified copy made. I have the deposit slip of the Francisco Distributing Company also for December 13, 1943, December 15, 1943, December 28, 1943, December 30, 1943 and January 2, 1944. I have copies of all of those. These are records which are kept in the regular course of business at the bank under my direction and supervision, in my custody, and I have brought them from the files of the bank today. These deposits are for one day.

The slip dated December 11, 1943 was marked U. S. Exhibit 36 for identification.

The slip dated December 13th, 1943, was marked U. S. Exhibit 36 for identification.

Exhibit 38 for identification was the slip dated December 15, 1943.

U. S. Exhibit 39 for identification was the slip dated December 28, 1943;

U. S. Exhibit 40 for identification was the slip dated December 30, 1943, and U. S. Exhibit 41 for identification was the slip dated January 2, 1944.

(The slips were marked U. S. Exhibits 36 to 41 for identification.)

(The Witness continuing):

In my testimony yesterday, I recollect stating it was Mr. Goldsmith who directed me to take charge of the collection of certain sight drafts to

(Testimony of Frank Dito.)

account. I see Mr. [310] Goldsmith here in the court room (indicating). I was personally acquainted with Mr. Goldsmith during that time. I would have to check the deposits to see if I took them in personally. From the copies I can tell that I did not. They were handled by different people. There was no one which was handled by me personally. I am familiar with the endorsement stamp of the Francisco Distributing Company during that period of time.

It was stipulated that Government's Exhibits for identification Nos. 26, 28, 29, 30 and 31 bore the endorsement stamp of Francisco Distributing Company, which were made by the Francisco Distributing Company.

The drawers of the checks dated December 9, 1943, December 11, 1943 and January 3, 1944, were drawn by Lou's Place. The checks in question were marked U. S. Exhibits 42, 43 and 44 for identification.

A further check, the drawer of which was Vogel, was marked U. S. Exhibit 45 for identification.

(The Witness continuing):

I have been employed by the bank 22 years. I am familiar with banking practice in this district. I am familiar with the various methods of identifying checks on deposit slip and among those is the method of writing certain numbers to identify a bank. Each and every bank has a number so all customers will put the number on the deposit tag instead of writing the name of the bank. (90)

(Testimony of Frank Dito.)

is some sort of a code number. Each state has a different number. For all the banks in San Francisco the code is (11); (90) is California outside of San Francisco. 16-202 is drawn on Bank of America, Vermont and 48th Avenue Branch in Los Angeles. The same identification would be in order for these other Clearing House numbers. [311] They would each refer to particular banks.

WALTER J. VOGEL

called as a witness on behalf of the Government, having been first duly sworn to testify to the truth and nothing but the truth, testified as follows:

I reside at 367 Earl Street, San Francisco. I am a tavern owner. The name of the tavern is the "Toreador Club". I don't even own it now. I owned that tavern during the months of December, 1943 and January, 1944. During that period of time I purchased some Old Mr. Boston Rocking Chair Whiskey in cases of fifths. I don't know the fellow from whom I purchased it. I made the buy at San Francisco Liquor Company. I made it at my place of business. A man came in after I was there about three weeks and wanted to know if I could buy some whiskey, and I said "Yes, I needed whiskey", and he asked me if I could take 100 cases. I don't know the man. He was kind of a dark man, medium size, so far as I can recall, and I couldn't say whether he had on a light or

(Testimony of Walter J. Vogel.)

dark suit. I was only at the place three weeks, and everything was strange to me. I had been running this place three weeks when this man came to see me. He came in around four o'clock.

Government's Exhibit for identification No. 45 is my check. I wrote that check myself. That is my signature. I saw the man on the day I wrote the check. I gave it to that man. He told me to make out the check. I wrote this check at the direction of that man. That is on the date I bought Old Mr. Boston Rocking Chair Whiskey.

Q. Did you give any cash to this man in addition to this check? [312]

Counsel for the defendant Goldsmith object to the question as being without foundation.

The Court overruled the said objection, to which counsel for the defendants Goldsmith and Feigenbaum duly Excepted, and the Court allowed an Exception as to all the defendants.

(The Witness continuing):

I did not give any cash at that time to this man when I gave him the check. After he brought me the bills, I gave him the cash. He told me I would have to pay him for getting the whiskey. I have seen a document entitled, "Francisco Distributing Company, No. 10092". I received this document from that man about an hour and a half or two hours after I gave him the check; he came back with this. Both of these transactions took place on the same day, which was December 6, 1943. When he came back about one hour and a half

(Testimony of Walter J. Vogel.)

later, I am sure he was the man to whom I had given the check. I think I gave him \$3,400 in cash. I paid \$24.50 for the whiskey. That was for 100 cases. (To the Court): I mean, \$2,450, or \$24.50 a case, for 100 cases. We talked about the whiskey. That took place in my place of business about four o'clock. There was no one present beside this man and myself. He asked me if I wanted to buy whiskey. I said yes, I needed whiskey very bad. He asked me how many cases. I said, "Well, how many can you get me". I thought he was going to say 10 cases, but he said, "I can get 100 cases". I said, "All right, I will take 100 cases", so I asked him how much is it, a case. He said, "It is \$24.50 a case". I said, "Is that all". I thought it was kind of cheap. So, he said, "Well, that is all for the whiskey". But he said, "Now, then, you have to pay me for getting the [313] whiskey for you". So then he told me to make him out a check for the whiskey. I think he wanted the cash, and I wouldn't give him the cash until he brought back the bill, so he brought back the bill. I gave him the cash that he asked. I think it is \$3,400. We figured it out later. The whiskey stood me \$59 a case. I did not have a conversation about the ceiling price with him. He told me to make out the check to the Francisco Distributing Company for \$2,450. I subsequently received 100 cases of Old Mr. Boston Rocking Chair Whiskey in cases of fifths. I checked the shipment after it arrived in the warehouse. I kept it in the

(Testimony of Walter J. Vogel.)

San Francisco Warehouse Company. I would draw on it two or three cases at a time. It was put in my name, and I paid the storage. It was left in the warehouse in my name. I wouldn't say the man who sold me the whiskey was a heavy-set man. He was about a man of medium build. As I remember, he was a dark-complected man. I didn't notice any peculiarities of speech that he had, or any other outstanding physical characteristics.

Invoice of Francisco Distributing Company No. 10092 was marked U. S. Exhibit No. 46 for identification. [314]

FRANCIS DUFFY,

called as a witness by the Government, and having been first duly sworn, testified:

Direct Examination

By Mr. Colvin:

I am in the tavern business at 6398 Mission Street in Daly City, and was in that business, in partnership with my father, in the months of December, 1943, and January, 1944. During December, 1943, I made a purchase of some Old Mr. Boston Rocking Chair Whiskey. This check, dated December 7, 1943, to the Francisco Distributing Company, now shown me, for the sum of \$2,000, is my check. The \$2,000 and the signature and the date were written by me, but the name of the Francisco Dis-

(Testimony of Francis Duffy.)

tributing Company was put in, written in there, by the fellow that I made the transaction with.

The document was marked U. S. Exhibit 47 for Identification.

This check dated December 17, 1943, for \$450, payable to the Francisco Distributing Company, was written the same as the other one, all except the name of the company. That is my signature, which appears thereon. I bought it from a fellow whose name I didn't know at the time. The whole transaction took place in my place of business. I imagine he was a fellow about six-foot-one, weighed about 185 pounds, kind of brunet, wasn't as dark as you, and still wasn't too light, either. I gave the check marked Government's Exhibit for Identification #47 to that man on December 7th.

The second check referred to was marked U. S. Exhibit No. 48 for Identification. [315]

The Witness (Continuing): I gave this check (Government's Exhibit 48 for identification) to that man. The date of my first conversation with the man was about the 3d or 4th of December, and took place at my place of business. I was the only one present. My father was sick. I imagine the time of the conversation was in the early part of the afternoon, around 1:30.

Counsel for the Defendants Feigenbaum, Blumenthal and Goldsmith Objected to the question as not binding upon any of the said defendants, and, the United States Attorney having stated that the

(Testimony of Francis Duffy.)

testimony was offered particularly as to the defendant Goldsmith but as to all the defendants,

The Court stated that the testimony would be admitted only as against the defendant Goldsmith, and not as against the other defendants, to which ruling counsel for the defendant Goldsmith Ex-
cepted.

The Witness (Continuing): I have looked around and haven't been able to see this man in the court for two days now. He said to me, "I understand you are interested in getting some liquor," and I told him I was. And he told me, "Well," he says, "I may be able to get you some." So I said, "Well, I would appreciate it very much, providing the price didn't go too high." So he said, "I will be back and see you in a few days." So he came back. At the time of this first conversation there was no mention made of the brand of whiskey at all. I told him I could take as high as 100 cases if I could get it. I did not give him any check on the first occasion. I did not have any other discussion with him on that first occasion. I had a conversation with him at a later time, after that first conversation on the 7th at my place of business. Nobody overheard the conversation at all. The first time the conversation took place around 1:30 in the afternoon. He came back again and said, "Well, I [316] think I have some liquor lined up." I said, "That's fine. How much is it going to cost me?" "Well," he said, "it is \$24.50 a case is the price, but to make a certainty of getting the liquor, there will

(Testimony of Francis Duffy.)

be a little premium." I asked him how much the premium would be. So he said twenty dollars a case, so I said "All right." He said, "Well, I will take a \$2000 check now and when I come back again to give you the bill to get the whiskey out of the warehouse, you will have another check, \$450, and the additional \$2,000 in cash. He told me the additional money must be paid in cash. He did not say why it must be paid in cash. I had no further conversation with him at that time. The brand name hadn't been mentioned yet. I understood it was to be fifths of whiskey. I knew it was going to be a blend of Bourbon whiskey. That is all. He said it was to be a blend of Bourbon whiskey. He said I would have it some time between the 17th and the first of the year. He said he would be back to see me as soon as he had the bills to release the goods from the warehouse and everything straightened out. I had no more discussion with him whatsoever. I gave him the check for \$2,000 on the 7th. I did not see him write the name of the payee Francisco Distributing Company. He had not told me where the whiskey was coming from. The name of the payee was left blank. After the 7th of December I saw that man on the 17th in my place of business and had a conversation with him, at which nobody was present that overheard the conversation. He came and told me he had the warehouse release slip, and that he would pick up the check for \$450 and the additional money in cash. I had received no invoice as yet. That is all the conversation that I

(Testimony of Francis Duffy.)

remember. Then I found out what kind of whiskey it was, and where it was billed through. He just told me it was Rocking Chair Whiskey, and I was to pick it up at the San Francisco Warehouse. He never made mention of the [317] fact that the money was going through the Francisco Distributing Company. I have seen Francisco Distributing Company invoice No. 10081. It came into my possession in the mail a few days after I had picked up the merchandise on the 22d of December, 1943. I went in a truck to the San Francisco Warehouse and picked up the whiskey there. The fellow and I who had the truck loaded it on the truck. The fellow with me was Vincent Markey. He ran our fruit and vegetable delivery service. I imagine the invoice came to me 3 or 4, maybe 5 days after that date. That was the first I saw the invoice. I have never seen this man since. On the 17th when I gave him this check for \$450 I gave him \$2,000 in cash. He didn't say anything about the ceiling price. I had no further transaction regarding this whiskey.

The Invoice, Francisco Distributing Company, No. 10081, was marked U. S. Exhibit 49 for Identification.

Cross-Examination

By Mr. Duane:

I never went to the Francisco Distributing Company. The fact is that I went to the San Francisco Warehouse Company.

ANGELO LOMBARDI,

called as a witness on behalf of the Government, and being first duly sworn, testified:

Direct Examination

By Mr. Colvin:

I am a tavern owner in Santa Rosa, and have operated that tavern since 1940, and was engaged in the operation of that tavern during December, 1943, and January, 1944. During those months, I purchased 100 cases of Old Mr. Boston Rocking Chair [318] Whiskey. I did not give both check and cash to the same party. I paid cash for the whiskey to a fellow in the Sportorium on Third Street, between Mission and Market. I see that man in the courtroom, the man with the glasses, sitting down.

(The witness identified the defendant Blumenthal.)

The Court stated, in response to a question by counsel, that this evidence would be limited to the defendant Blumenthal.

The Witness (Continuing): I paid \$3,050 in cash to Mr. Blumenthal. It was between the 15th or 18th somewhere around in there. I don't quite remember the date. I have brought invoices with me. I bought 100 cases of whiskey. About the 15th Mr. Minkler contacted me about the whiskey. Mr. Minkler was a tavern owner at Santa Rosa. He contacted me at my place of business. We went to San Francisco, and we bought this whiskey around

(Testimony of Angelo Lombardi.)

the 18th of December. The first time we went to the Sportorium. I went to the Sportorium with Mr. Minkler. I did not see Mr. Blumenthal at the Sportorium the first time. I went into the Sportorium and Mr. Minkler went and talked to somebody and I stayed in front there looking at some fishing poles and things he had. Mr. Minkler went in the back room there. I didn't pay any attention.

(To the Court): I did not see this man I was with talk to Mr. Blumenthal on that occasion. On that occasion I did not have any conversation with Blumenthal. After Mr. Minkler came out of this room, he said they got in contact with somebody and the whiskey was O.K. Then Minkler and I went back to Santa Rosa. We next came to San Francisco around the 20th of December. I am not exactly sure about the date. Around the 20th of December I came to San Francisco with Minkler. I went to the Sportorium with \$3,050 in cash. On that occasion I saw Blumenthal at the Sportorium. All three of us went [319] together in the back room and paid the money to Mr. Blumenthal, laid it right on the shelf. No one else was in the back room beside Blumenthal and Mr. Minkler and myself. At that time I did not have any conversation with Mr. Blumenthal. I did not say anything as I gave him the money. I was just leaving it all up to Minkler. I don't know whether Minkler said anything. I left, and they talked a little while. We left. They said, "The whiskey will be up there in a few days.

(Testimony of Angelo Lombardi.)

Mr. Minkler said that. I went back to Santa Rosa with him.

Q. What happened back at Santa Rosa regarding this transaction?

Counsel for the defendant Blumenthal Objected to the question as hearsay and not binding on the defendant Blumenthal. The court overruled the objection to which ruling counsel for the defendant Blumenthal Excepted.

The Witness (Continuing): * * * We just left there, and Minkler went back to his own place of business and I went back to mine, and about 2 or 3 days after, he called up and says that the whiskey was on its way.

Counsel for the defendant Blumenthal objected to this evidence and to anything that happened between Minkler and the witness. The Court overruled the objection, to which ruling counsel for the defendant Blumenthal Excepted.

The Witness (Continuing): I received a phone call from Minkler. He said, "The whiskey will be up in a few days." About Friday the whiskey arrived, 100 cases, by Sonoma-Marin Freight Company. That is my signature on the check for \$2450 shown me. I wrote the check out and delivered it to the name on there, Clyde Minkler. I wrote the check for [320] \$2450 at the instructions of Clyde Minkler.

(The check was marked U. S. Exhibit No. 50 for identification.)

I have seen the invoice now shown me of the

(Testimony of Angelo Lombardi.)

Francisco Distributing Company, No. 10147-A. That came in about the first of January, in the mail. It was in the complete form that it is now, when I received it. The words "Salesman Weiss" were on there when I received the document. I noticed them at the time. Since that time this document has been part of the files and records of my business. The records are kept by myself.

(The invoice was marked U. S. Exhibit 51 for identification.)

The Witness (Continuing): I received 100 cases of fifths of American Distillers Rocking Chair, Mr. Boston, blended bourbon about the 3d of January. I had no further transaction regarding the purchase of this whiskey. I last saw Mr. Minkler about last November. He sold out and went to New Mexico or some place. I have not seen him since approximately last November.

Cross-Examination

By Mr. Riordan:

I have been in the liquor business in Santa Rosa since 1940. Before that I was working as a bartender. This is the first bar of my own that I have had. I have bar-tended for other outfits. I am a native of California. I have never been convicted of a felony outside of speeding. I asked for 25 cases, but Mr. Minkler said I had to use 100. I could use it. We knew we couldn't get it before the Christmas holidays. I haven't seen Mr. Minkler

(Testimony of Angelo Lombardi.)

since around November or a little later. I don't know the exact date; it was when he sold out, the last time I saw him. We went down here together. He is now in New Mexico. That is all I know where he is. I don't know where in New Mexico. I have not talked this case over with the government officers on a [321] number of occasions. We just talked about the case when I was subpoenaed down here, that's all. I talked to Mr. Roy Johnson. We haven't talked about the case. I have not talked to anybody else. I went to the Sportorium to deliver the money. Mr. Minkler did the negotiating, and I remained in the front. He did all the business. All I know, I gave my money in the Sportorium. I did not give a check in the Sportorium. I gave the check to Minkler. I testified before the State Board of Equalization in the same matter. The officers from the State were the first ones that brought us in. They talked to us about the same. The State were the first people to talk to me. I am operating under a regulation State Board of Equalization license. When I testified before the State Board of Equalization, I was asked to describe the man I talked to in the Sportorium. I don't know that I described him as a man who was smooth-shaven. I don't remember that. I do not remember whether the man I saw in the Sportorium was smooth-shaven or not. It was dark in there. I could not tell if he was dark or what. Went in the back room. That was the only conversation I had with him. I don't remember whether or not I testified before

(Testimony of Angelo Lombardi.)

the Board of Equalization that the man wore glasses or not. I testified before the Board of Equalization the man was dark. I think he was dark. I am pretty sure that is what I said at that time. Mr. Blumenthal has not been pointed out to me at any time since this alleged transaction by anybody other than here in court today. I don't know the man's name at all. Nobody at any time along the way since December 1943 and January 1944, whether they were officials or otherwise, said, "There is a man who is known as Blumenthal to you." At the hearing before the referee of the Board of Equalization of the State of California on January 19, 1945, in the State Building of San Francisco, before Referee A. E. McDonald, in the matter of the complaint of George Stout, Liquor Administrator, against Harry Blumenthal, file No. 37945, [322] at page 72, commencing at line 3 and ending at line 20, I was asked the following questions and gave the following answers:

"Q. In some of these statements you have made you were under the impression that the man you talked to down at the Sportorium was about fifty years old? A. I am not sure.

Q. He may have been fifty or more?

A. Yes.

Q. Is that correct? A. I don't know.

Q. You don't remember the color of his hair? Didn't we have—

A. His hair was dark, I remember that, and he was dressed in dark clothes.

(Testimony of Angelo Lombardi.)

Q. Anything else about him that you recall?
Would you say he was about six feet tall?

A. About five eleven or twelve.

Q. Weighed a couple of hundred pounds?

A. A pretty big man.

Q. Light complexioned?

A. It was light in the corner, but where they called me over it was pretty dark in there.

Q. He was smooth shaven, nothing on his face?

A. Yes.

Q. Do you remember whether he wore spectacles or not?

A. No, I don't think he did.

Q. You saw him just once?

A. Yes.

Q. That is all."

I thought he was about that. It was just the once I saw him. My memory is about the same at a later date as it was at this earlier date when I gave the testimony. I was at the Sportorium twice. I was there for a very brief time on each visit. The first time I don't think it was three minutes or more. At the time of my first visit I was in the front of the store. The second time it was longer than 3 minutes. Mr. Minkler had a talk with him and we had to go in the back room. It took a little longer than 3 minutes. I went there afterward just as a [323] matter of passing the money, and out. It would have been more than a minute or two. Probably 2 or 3 minutes. I don't pay any attention to the time. Once is all I remember seeing Mr. Blumenthal. I didn't pay much attention to him.

Before the recess I stated that I only talked to

(Testimony of Angelo Lombardi.)

one officer, and that was Mr. Johnson. We just talked about different things. I talked to state officials and asked them how they were. We never did discuss here about it. I remember a man by the name of Mr. Worthington, who was connected with the Office of Price Administration. I gave him the same statement I gave the rest. He wrote it down. I signed it. He did not give me a copy of it. I didn't say that Mr. Blumenthal was the man that saw that I got the whiskey. I was doing business with Minkler. I told him if I could see him—I couldn't describe him, because it was just a few minutes I saw him all at once. They did not tell me that if I did not tell them who the man was that was dealing with me that I would be indicted, nothing of that kind at all. I was never indicted for this transaction myself in any other separate indictment. I have never had any charge by the federal government placed against me that I know of; the State Board of Equalization has placed a charge against me. We had a case up there about it. My license has not been taken away. I am still doing business. At the hearing before the Board of Equalization I was asked the following question and gave the following answer:

“Q. If you were to see the individual, Mr. Lombardi, that you talked with at the Sportorium on Third Street, would you be able to identify him?

A. Well, I don't know if I could or not. I didn't do any talking with him. I didn't see him long.

(Testimony of Angelo Lombardi.)

That was the first time I seen him. I don't think we were in there five minutes." [324]

Cross Examination.

By Mr. Weiss:

I do not know a gentleman by the name of Mr. Weiss. I have never met a man by the name of Mr. Weiss. (To Mr. Weiss:) I have never had any transaction with you.

Re-Direct Examination

By Mr. Colvin:

At the time these questions and answers were put to me on the occasion Mr. Riordan, counsel for Mr. Blumenthal, reminded me of, Mr. Blumenthal was not in the room. I did not have a chance to observe Mr. Blumenthal at the time. During the time of that hearing, he was not present at any time. I did not have an opportunity to see him before the date that I was subpoenaed for this case. The first day I walked in the hallway there, I saw him in there. I remember it was him. I don't know if he had a moustache or not.

HERMAN FINGERHUT

called as a witness for the Government, and being first duly sworn, testified:

I have the Forum Cafe in Vallejo. I have been in business up there six years, and was in business

(Testimony of Herman Fingerhut.)

during the months of December, 1943, and January, 1944. During that month I purchased some Old Mr. Boston Rocking Chair Whiskey. I don't know the man's name from whom I purchased that whiskey at the time. I went to the Sportorium and contacted the man there.

In response to a question by Mr. Dunne,

The Court stated: "This testimony is received as to the defendant Blumenthal."

The Witness (continuing): The place where I purchased this [325] whiskey was the Sportorium. I don't know the exact day, the first time I went in there, but I imagine it was the first part of December. I paid \$55 a case for this whiskey. As close as I remember, I first went to the Sportorium about the 3d or 4th of December. I seen a man there—I don't know his name. I think it is that man in the last row there, something similar to that man. I am referring to that man with the brown suit. (To the Court:) Mr. Blumenthal is the man I have in mind. That was the man I saw. On the occasion of my first visit to the Sportorium I went alone. I had a conversation with that man on that occasion. Just the two of us were present at the conversation. I imagine it was the early part of the afternoon. The conversation was regarding some whiskey. At that time I didn't know what kind of whiskey. All I knew I could get some whiskey. What it was I don't remember. I was not told. I told him I needed some whiskey. He told me he could probably get it for me. I said I could use some, and he asked me

(Testimony of Herman Fingerhut.)

how many cases I could use. I said at the time around 200 cases. He said well, he could take care of me. He told me the price was \$55. I had to pay \$24.50 a case and make out a check for that and the rest was in cash. He told me he didn't know exactly when I could get the whiskey. He said he will get it in the latter part of the month, as soon as it comes in, if he would let me know. I had no conversation with him about the check, outside of him telling me to make out a check. The first check I made out was for \$2,000. I did not make it out on the occasion of my first visit. The first time there was no mention about a check at all, because the first time I went to see him I did not know whether I could buy the merchandise, because it was too much money for me to pay. That is the only conversation we had the first time. He didn't say he would get in touch with me. He did not say to come back. I went home, and I told him if I decided I wanted to [326] buy it, I would come back and see him. There was no further conversation the first time. Pursuant to that conversation I went back, I imagine 3 or 4 days after that, maybe a week; I don't know exactly. That would be something like the second week in December. Nobody went with me. On the second visit I went to the Sportorium on Third and Stevenson. I went alone. I know where Market Street is in San Francisco; the Sportorium is one short block away from it. It is right on the corner of Stevenson and Third. On this second visit to the Sportorium I saw Mr. Blumenthal. I had a con-

(Testimony of Herman Fingerhut.)

versation with him regarding this whiskey. Just him and I was present. This was early in the afternoon. The conversation took place in the back of the Sportorium. I told him, "I am ready to buy some of that whiskey" but I could not handle 200 at the time, I could only handle 100, but I knew somebody who would take the other hundred cases. He said that was all right. There was no other conversation, outside I told him who the other party was, a man by the name of Walter Travis. I didn't know what kind of whiskey it was going to be at that time. It was going to be a blend. He told me the whiskey was going to arrive about the end of the month. He did not know exactly. There wasn't much said outside I told him I was going to take a 100, and Travis was going to take the other hundred, and then I give him a deposit on it of \$4000 in the form of four one-thousand-dollar bills, which I got from the Bank of America right on Powell and Market, I think; I don't know exactly where. At that time he said he wanted cash now and the check would come a little later. He did not give me any instructions then regarding the writing of the check. The total cash payment from that conversation was \$4,000 then; I paid him \$4,000 the second time and I think we were supposed to pay him some more money later on. I was not taking 200 cases, I only took 100, so it only cost me \$4,000, and I think Mr. Travis gave him money [327] later on, I believe. When I gave him the \$4,000, I said it was for 200 cases at that time. That conversation

(Testimony of Herman Fingerhut.)

took a couple of minutes. (To the Court:) All that transpired was I gave him \$4,000 in cash at that meeting. I had another meeting later on. Mr. Travis and myself were present at that meeting, which was a few days later, I think. I told him Mr. Travis was taking the other hundred. (To the Court:) I won't say for sure I saw Mr. Travis pass the money. All I do know is I said that Mr. Travis was going to take the other hundred and I was going to take that hundred, that's all. The third time I gave Mr. Blumenthal a check for \$2,000. He told me to make it out to the Francisco Distributing Company for \$2,000. That one hundred cases of whiskey was delivered to me. The 200 cases were delivered in one place, in Mr. Travis' warehouse, and I went and got my hundred from the warehouse. That was Old Mr. Boston Rocking Chair Whiskey. This invoice of the Francisco Distributing Company (marked U. S. Exhibit 52 for identification) came into my possession before I got the whiskey. I got this from the man at the Sportorium, after I give him the \$2,000; he give me this and I owed the balance of \$450. (To the Court:) I paid that on a check; the \$450 was in a check to the Francisco Distributing Company. I don't know about this "G" with a line under it on the face of that document. (To the Court:) I didn't put it on after I got it. It is in the same condition as when I first got it. I made a later purchase of Old Mr. Boston Rocking Chair Whiskey about the 3d or 4th of January. I purchased that whiskey from the same place and

(Testimony of Herman Fingerhut.)

from the same man. I bought 25 cases. I paid for that whiskey \$55 a case. I received that whiskey about a week later. I think a week or two later, I don't remember exactly. Mr. Travis give me an invoice of the Francisco Distributing Company, now shown me, No. 10151, which is now shown me. I don't know where he got it, but he [328] give it to me as soon as he come back from the city.

The document was marked U. S. Exhibit No. 53 for identification.

The Witness (continuing): That invoice arrived before I received the 25 cases of whiskey. The 25 cases of whiskey came together with—there was 100 altogether, and Travis got 75 and I got 25. I don't know the exact date when that did come. He received it. I give my money to Mr. Travis to bring down, because I didn't come down to San Francisco any more.

(To the Court:) I talked with Mr. Blumenthal about buying 25 cases. I don't remember the exact date. All I know is I got a telephone call wanting to know if I needed any more whiskey.

The check now shown me, (U. S. Exhibit 54, marked for identification) on the Bank of America, Vallejo Branch, for \$4,000, payable to "Cash," is in my handwriting. I signed it myself. I made it out at the bank. I think the one on Powell and Market, Bank of America. It is marked here, "November 24." I cashed it in, and got \$4,000 for it. That is the \$4,000 to which I have referred. The date

(Testimony of Herman Fingerhut.)

of that was November 24, 1943. I made out the check now shown me dated December 9, 1943. That is my signature that appears thereon. I made that out at the Sportorium on December 9, at the instruction of the man who was with me. He told me to make the check payable to Francisco Distributing Company, for \$2,000. Mr. Travis was with me at that time. At the time I gave the check to Mr. Blumenthal for \$2,000, I gave him \$1,050 in cash.

(The document was marked U. S. Exhibit No. 55 for identification.)

I made out the Bank of America check now shown me, dated December 12, 1943. That is my signature thereon. I made that check out at home. I mailed it to the Francisco Distributing [329] Company at the direction of the man from the Sportorium. There was a balance of \$450, and I was told to mail that later on. I don't think he told me what date. I received the invoice of the Francisco Distributing Company (U. S. Exhibit 52 for identification) from the man at the Sportorium. I believe he wrote that "Received \$2,000" and "Balance \$450." When he handed me this invoice he said, you just owe \$450, and that is all at this time. That was not the time he told me to write that \$2,000 check—the \$450—no. I don't know just when he told me to write it. I wouldn't say for sure. I paid no more money in any way than that which we have named for the first 100 cases that I bought during the month of December. The Bank of America

(Testimony of Herman Fingerhut.)

check now shown me to Francisco Distributing Company for \$612, I wrote out at home. That is my signature that appears thereon. I wrote it about December 30, I believe, at home. After I wrote the check, I give it to Mr. Travers (Travis). I gave Mr. Travis some cash. I don't remember how much right now. The difference between that and \$24.50 and \$55.00. This check is made out for 25 cases at \$24.50 a case, and the whiskey cost \$55, and the difference I gave him in cash.

(The document was marked U. S. Exhibit 57 for identification.)

During the month of December I received \$2,000 in cash from Mr. Travis. That was after the date on which I had paid Mr. Blumenthal \$4,000 in cash. I received the \$2,000 from Mr. Travis about the same time we went down and paid the \$2,000 in cash. I received the \$2,000 cash from Mr. Travis. I think in his place of business in Vallejo. It was just before the third trip we made to the Sportorium.

Cross Examination

By Mr. Riordan:

I have never been indicted for a felony. I am in the [330] liquor business myself in Vallejo. The name of that place is Foreign Cafe. I have been there about six years. Before that I worked in a radio shop. This was my first venture in the liquor business. I went to lunch at noon today with Mr. Travis and Mr. Johnson, the government man, and

(Testimony of Herman Fingerhut.)

Mr. Patterson from Vallejo, and Mr. Harkins, and Mr. Lombardi. We did not talk the case over during the noon hour. We did not talk a thing about the case. Nothing was said to me about what transpired after I was ordered out of the courtroom this morning. I said I wished the case was over. They just laughed about it. I wanted the whiskey very badly. I came here to San Francisco practically daily to get some whiskey, so I could keep operating. That is the true picture. I didn't know Mr. Blumenthal. Nobody came to help me solicit some whiskey for this transaction. I asked somebody else where I could get some from. I think his name is Derrow. I don't know him well at all. He was at the 365 Club in San Francisco. I am only in California seven years. I first met him at the 365 Club. He was playing in the orchestra there. I have been there about five times. I did not see him at any other place except the 365 Club. I think this man's name at the 365 Club was Derrow. I got acquainted with him. I don't remember how I got acquainted. I don't think he took me to the Sportorium. I don't know whether he took me there or not. I don't remember whether he took me right there, or not. I know we got acquainted. I don't know whether he took me there or not. I just made the remark, "It looks like I'll have to close up; I need some whiskey." He said well, maybe he knows somebody who would get me some. I didn't exactly say, "Will you help me buy some whiskey?" I asked him if he knew where I could get some, if he

(Testimony of Herman Fingerhut.)

could get me some. He said, "I'll try to help you."

He didn't have any whiskey there. That place was a sports shop, that includes fishing tackle, shotgun shells, all sorts of sporting paraphernalia. I went into the Sportorium [331] about three times, I believe. The first time I went in, I don't know how many people were in there, maybe one or two. These besides the man I talked to. On the second occasion about the same amount of people were in there. I didn't see anybody in there, outside of the clerks, one or two clerks there. They were working there. I am just assuming that; I didn't know the boss, and when I say clerks I am just assuming that. On the third occasion I imagine about one or two parties were in there. I have no recollection of just how many there was. To be fair with this jury, I would say I don't know how many people were in there on any one of those visits. The man I talked to in the Sportorium on each of these visits was the same man. I am sure of that. When this man wrote on this exhibit that I identify as "Received payment," etc., we were in the back room. It looked more like a stock room than an office. It did not have a desk there, just a kind of bench, shelves of some kind. It was not a place where they had some of the paraphernalia that goes with keeping receipts and disbursements. At the time he signed this particular document that I identified, Mr. Travis and this man and myself were present. That would have been the third visit. That had to do with the 200 cases of whiskey. I think that was Mr. Travis' first visit

(Testimony of Herman Fingerhut.)

as far as I know. I was questioned about this case before I ever was subpoenaed to come into the federal court or knew about a federal charge over in Vallejo. That was by the Board of Equalization. I made a statement that I did not know who sold me the whiskey. I didn't know the man's name. I did not exactly say that I didn't know who it was. It looks like the man back there. I was first interrogated by the state officials in Vallejo. In September, 1944. My memory is just about the same as it was then.

Q. Now, you were uncertain then, weren't you, as to who the man was?

A. Well, I haven't [332] seen the man since.

Q. I said when they asked you, you were uncertain then, and that still goes, doesn't it?

A. At that time, yes.

Q. You are still uncertain, aren't you honestly, as to who the man was?

A. Well, it looks like the man, is all. I am going by general resemblance. Those state officials wanted me to identify that man if I could. I said if I seen the man, I probably could. I didn't go to see him. I am still doing business under my license. Nobody has threatened to take it away from me yet. I have not been indicted. I have got no kind of either a federal or a state charge against me, or any local charge in the locality of Vallejo against me that has to do with my license. No official, either state or government, told me that if I did not identify somebody who gave me this whiskey, that I

(Testimony of Herman Fingerhut.)

would lose my license. I am sure of that. No general types of threats without any particular type of language, that if I did not come forward with information I would lose my license. I am equally sure of that. Nobody explained to me in either state or federal lines when I was a part of "this conspiracy" why I was not indicted or informed against or some kind of a charge put against me. No promises were made to me of any kind that I would not be indicted or informed against or charged by the State. I am equally sure of that. There were two local men whom I have talked to since the time the Old Rocking Chair Whiskey case arose, and I think one or two federal men—one state man, I know. There was Mr. Patterson, Mr. Leo from Vallejo, and I think Mr. Koster from the state, and Mr. Johnson from the federal, is all I can remember. I do not know what kind of whiskey I got; I assume I got whatever the label said. I don't know offhand that I sold the whiskey for \$200 a case over the bar. Not quite \$200; [333] probably \$150. I never charged the public any more for that whiskey as I dispensed it.

Re-direct Examination

By Mr. Colvin:

I sell by the drink. That is the only license I have.

WALTER H. TRAVIS,

called as a witness by the Government, and having been first duly sworn, testified:

Direct Examination

By Mr. Colvin:

I am a tavern owner. The name of my tavern at that time was Lou's Place, 717 Sonoma Street, Vallejo. I operated that place during the months of December, 1943, and January, 1944. During that time I purchased some Old Mr. Boston Rocking Chair Whiskey from a gentleman in the Sportorium on Third Street. I see that gentleman here, in the court-room. (pointing out the defendant Blumenthal). I bought 175 cases of Old Mr. Boston Rocking Chair Whiskey from Mr. Blumenthal. I bought those in separate parcels twice. I bought 100 cases on the first occasion, I paid \$55 a case, \$5500 for that whiskey. I recognize Government's for identification No. 44, check for \$2,000. That is my check. I wrote it, and that is my signature. After I wrote it I carried it to the Sportorium on Third Street in San Francisco. I did not write it in the Sportorium. I carried it in there. I wrote the check about December 9. I was told to make it out to Francisco Distributing Company by the gentleman at the Sportorium.

Q. You say the check was written before you arrived at the Sportorium. Will you clarify that testimony please?

Mr. Riordan: I submit he can't cross-examine his own [334] witness. There is nothing to clarify.

(Testimony of Walter H. Travis.)

The Court: If there is an objection, the objection is overruled and an Exception noted.

The Witness (Continuing): No part of the check was written in the Sportorium. That check was not written at the time of my first visit to the Sportorium. It was written the second. The date of my first visit to the Sportorium was somewhere around the 9th of December. Mr. Fingerhut went with me on that occasion. "Government's for identification No. 55" is not my check. I did not write any of Government's for Identification No. 44, check for \$2,000, at the Sportorium. I wrote that check at my office in Vallejo about the 9th of December. I don't know that there was anyone present beside myself when I wrote the check. Mr. Fingerhut told me to write that check. That check was entirely made out when I arrived at the Sportorium. When I took the check and the money I had a conversation with Mr. Blumenthal on that occasion. That was the occasion of the 9th to which I have just referred. That was the occasion of my first visit; no one else was present at that conversation beside myself and Mr. Fingerhut and Mr. Blumenthal. It was just before noon. The conversation was that we come and pay the money to get delivery of the whiskey. The name of the whiskey was mentioned, I think. I think it was named: we would get 100 cases of Rocking Chair Whiskey; that was what was said. We was to send him a check for \$450. Mr. Blumenthal said that he told me to send the check to the Sportorium. I had to take \$1,050 down

(Testimony of Walter H. Travis.)

at the time I took this check. He just said that we would have to pay \$2450 for the 100 cases by check to the Francisco Distributing and the \$1,050 to him in cash. On the occasion of that conversation I gave \$1,050 to Mr. Blumenthal. I did not have any further conversation with him at that time. I have seen that check [335] for \$450, Government's for identification No. 43. That is my check. I wrote it at my office. That is my signature. I mailed it to Mr. Blumenthal to the Sportorium. I have seen this Francisco Distributing Company invoice No. 10086. I saw that for the first time when I delivered the check and the money. That was on the occasion of my first visit to the Sportorium. Mr. Blumenthal gave me that invoice. He wrote this: "\$2,000, balance due \$450." He wrote that in my presence, "Received on account \$2,000; balance due \$450." Since that time this invoice has been part of the files of my business. I keep them in my custody.

(The document was marked, U. S. Exhibit 58, for identification.)

With reference to the first 100 cases of whiskey I gave Mr. Fingerhut two thousand dollars in cash. I have seen the document now shown me, a draying company bill, Kellogg Express & Draying Company, 100 cases of liquor. I saw that when the stuff was delivered to 1800 Sonoma Street, my place of business. I got that bill from the expressman. This bill arrived with the 100 cases of whiskey.

(The document was marked U. S. Exhibit 59 for identification.)

(Testimony of Walter H. Travis.)

I was told the whiskey would arrive in a few days after he got the \$450. I was not told any special date. I was told when to send the check for \$450. I made a subsequent purchase of 75 cases for \$55 a case from Mr. Blumenthal at the Sportorium during December, 1943, or January, 1944. At that time I bought 25 cases of Old Mr. Boston Rocking Chair Whiskey for Mr. Fingerhut, about the third of January. I have seen this Francisco Distributing Company invoice, No. 10152. It was given to me by Mr. Blumenthal at the Sportorium about the 3d of January. I have seen Government's Exhibit No. 53 for identification— [336] the invoice to the Foreign Club. I got it at the Sportorium at the same time I did the other one. I took it back to Vallejo and gave it to Mr. Fingerhut.

(The invoice to Lou's Place was marked U. S. Exhibit No. 60 for identification.)

I think I made two or three trips altogether to the Sportorium. I do not remember—two or three, could have been three trips. There could have been a trip from the time of the first purchase to the second purchase. According to my best recollection that was about December 30th, something like that. I only had a conversation at the Sportorium with Mr. Blumenthal. Mr. Fingerhut was present at that conversation. That conversation was some time in the forenoon. All I know about the conversation was that we were to divide the hundred cases, I was to take 75 and him 25, and I was to bring the money in. The best of my recollection was

(Testimony of Walter H. Travis.)

I was to put the money and the checks there for the last payment—the date I can't remember. I did not make any trip to the Sportorium after I paid for the 75 and the 25 cases. It was on that occasion when I paid for the 75 and the 25 cases that I got those invoices which I have here, No. 53 and 60 for identification. When I held the first conversation with Mr. Blumenthal we started out in the back of the store. There is a room back there. We went into the back room, just kind of a crude structure; it was not plastered. Kind of a little warehouse, like. On the occasion of my first trip there, there was no one in the store. I think there was a clerk in the front; I don't remember. On the occasion of my second visit, we held our conversation in the back part of the store, not in the room, but in the back part of the store.

Cross-Examination

By Mr. Riordan:

My place of business is known as Lou's Place. I had [337] operated that place at that time about 7 months. I had not operated any other place prior to that in the liquor business. At that time I had only been in Vallejo about 4 years, but I lived there before, in and out. I am not a native of California. I have never been indicted for a felony. I haven't any indictment out of this case pending against me. I have no other state charge or local charge against me out of this case. I was very anxious to get liquor for my place so my place could continue to operate and continue to do business up there. Mr. Finger-

(Testimony of Walter H. Travis.)

hut told me I could get some liquor and I went with him to see if somebody would help me get it. There was no liquor in the back room where I say I negotiated the transaction. Mr. Fingerhut and I went to lunch at noon today with the officials. We did not talk over the case. Not one word was said about it. They didn't ask me any questions and I didn't ask them any questions, or make any statement concerning the case at all. We just had lunch together. We talked about other business, but not that. Mr. Fingerhut paid for some of the lunch and Mr. Patterson paid for some. I didn't do anything. I bought the dinner yesterday, for a different group. I saw Mr. Blumenthal write something on each of the invoices, No. 52 and 53, and the invoices to Travis, Nos. 58 and 60, about so much paid and the balance due, right on the show-case. As a matter of fact, I was taken by a government agent over to Mr. Blumenthal's place after this transaction had all finished and long after January, 1944, to stand out there while I looked with this government agent, while a man to whom I was shown, meaning this defendant, Blumenthal, came out of the store. That is what really happened. That was about the first of September, 1944, something like that. There was a little something said; I don't remember. Nobody said that I had better identify somebody who sold me some whiskey or else I might or possibly would lose my license. Nothing of that type or kind was said. [338] No threats of any kind were made to me.

(Testimony of Walter H. Travis.)

Q. But the truth is, you have never been indicted in this conspiracy that you were also in?

A. No.

Mr. Colvin: I ask that that be stricken.

Mr. Riordan: Well, it goes to the weight and credibility, your honor, and the interest and bias and prejudice, as to why he might be testifying.

Mr. Colvin: It is an assumption of counsel that the witness was in the conspiracy.

The Court Granted the Motion to Strike the Testimony, to which ruling counsel for the defendant Blumenthal Excepted.

The Witness (Continuing): I did not cash any check at the Sportorium. I am not sure whether I made two or three trips to the Sportorium. Mr. Fingerhut was not there with me on more than one occasion when these invoices were signed. The other occasion I was there alone. I paid the cash to the man who wrote the notation, whoever wrote on these invoices, that is the party I paid the cash to.

Redirect Examination

By Mr. Colvin:

During the month of September, 1944, I did not identify the defendant Blumenthal to any agent. I was taken up there to see if I could identify him, but I couldn't see him. I wouldn't identify anybody, I wouldn't say I did unless I know him. I didn't see the defendant Blumenthal between the time of those sales and the time of this trial. After

(Testimony of Walter H. Travis.)

all of this refreshment of my memory I still identify the defendant Blumenthal.

Re-Cross Examination

By Mr. Riordan:

The envelope I mailed to the Sportorium was addressed to the store, the Sportorium, not Blumenthal. [339]

EDWARD C. HARKINS,

called as a witness by the Government, and having been first duly sworn, testified:

Direct Examination

By Mr. Colvin:

I am special investigator for the Alcohol Tax Unit, working on the black market cases involving whiskey. My present office is Room 512 in the Custom House. I investigated this case with the assistance of others. I have had a conversation with Mr. Goldsmith regarding this case on several occasions. I was present early in January when Mr. Goldsmith and Mr. Weiss were together with special investigator Gaines. Mr. Gaines is a special investigator of the Alcohol Tax Unit. The conversation took place in the Empire Building, where we had our offices at that time. I believe there was an inspector by the name of Brunderol present. Inspector Wilson might have been present. (To Mr. Friedman): The year is 1944.

(Testimony of Edward C. Harkins.)

Q. Was that conversation regarding this case?

Mr. Friedman: I object on behalf of the defendant Feigenbaum, as not binding upon him.

The Court: This testimony with reference to any conversation with the defendant Goldsmith, of course it would not be admitted at the present time against the other defendants.

Mr. Dunne: As to the defendant Goldsmith, the objection is that there has been no foundation laid, and no proof of any corpus delicti of the crime charged in the indictment.

The Court: I will overrule the objection. You may have an Exception.

The Witness (Continuing): Special investigator Gaines was questioning both Mr. Weiss and Mr. Goldsmith regarding various shipments of whiskey. He asked them about these two carloads of Old Rocking Chair Whiskey, who purchased it, how it was [340] handled. Mr. Weiss, I believe, did most of the talking. He said that his firm received \$2.00 a case for clearing it through their books. Mr. Goldsmith concurred in that. Mr. Goldsmith and Mr. Weiss both stated that they divided the \$2.00, each taking a dollar. They both stated, agreed, that they did not sell any of the whiskey. It was sold by others, and they received the check generally for the payment of the whiskey in advance of the date that they had to take up the sight draft bills of lading. At that time they did not tell us who actually sold the whiskey. With relation to the dispo-

(Testimony of Edward C. Harkins.)

sition of these three carloads of whiskey, I think the conversation covered the import tax on this whiskey. After this conversation I had another conversation with Goldsmith regarding the facts of this case; early in September of 1944 in the State Building, San Francisco, was the next conversation:

Q. Who was present at the conversation?

Counsel for the defendant Goldsmith Objected to the question on the ground that the same was incompetent, irrelevant and immaterial and was after the conclusion of the alleged conspiracy in September, 1944, and also upon the ground that the corpus delicti had not been established.

The Court Overruled the Objection, to which ruling counsel for the defendant Goldsmith then and there duly Excepted.

The Witness (Continuing): Special Investigator Koster of the State Board of Equalization and Mr. Goldsmith and myself were present.

Mr. Colvin: Q. What was said relating to this case?

Mr. Dunne: The same objection, ruling and exception, if your honor please.

The Court: Very well. [341]

The Witness (Continuing): We questioned Mr. Goldsmith about who actually bought him the whiskey, who owned it, referring to these two carloads of Rocking Chair whiskey. He said that Blumenthal brought it in, and when asked if he knew of his own knowledge, he said, "No." We asked him

(Testimony of Edward C. Harkins.)

what he received for his share of it, and he said the Francisco Distributing Company received \$2.00 per case, of which \$2.00 he gave Weiss half, gave Weiss \$1.00. There was a little other question, but it was quite a short interview at that time. I did not show Mr. Goldsmith any documents at that time. I think that is the essential part of the conversation as to Mr. Goldsmith. After that time we had a conversation with the defendant Goldsmith at the office of the Alcohol Tax Unit on September 13, 1944. Mr. Goldsmith and his attorney, Mr. Duane, and, I believe, Mr. Roy Johnson of the Alcohol Tax Unit, and myself, were present.

Mr. Dunne: Same objection.

Mr. Friedman: Same limitation, Your Honor.

The Court: Same limitation, same exception noted by counsel for Mr. Goldsmith.

The Witness (Continuing): Mr. Goldsmith was further questioned about these two shipments of two carloads of Rocking Chair whiskey, and at that time I showed him several invoices that I had in my possession. Government's for Identification No. 22, Francisco invoices to The Brig was in my possession at the time of that interview, and I showed that document to Mr. Goldsmith then and there. I asked him who wrote it, and he stated that he wrote it himself, identified his handwriting. Government's for Identification No. 23, Francisco invoice to The Brig was in my possession then and there, and I showed that document to Mr. Goldsmith. I asked him who wrote this one, and he iden-

(Testimony of Edward C. Harkins.)

tified it as being in his handwriting and that he wrote it. Government's Exhibit No. 52, Francisco invoice to Fingerhut, [342] was in my possession then and there, and I showed that document to Mr. Goldsmith. I asked him who wrote this, and he said that he wrote it. Except, he said, he did not make the notations of the \$2,000. He said he didn't know who made that. I referred to the notation, "Received on account \$2,000. Balance due \$450."

The document now shown me, Government's No. 58 for identification, Francisco invoice to Travis, I showed that document to Mr. Goldsmith. He identified that document as being in his handwriting, all but the notation likewise on this. He said he didn't know who wrote that. I showed Mr. Goldsmith various other documents. He identified a number of the invoices that he wrote. He stated that he wrote most of the invoices, that a few were written by his bookkeeper. On that occasion I had other conversations with him relating to these two carloads. We again asked him about the deal and we got the same answer, that they received \$2 per case, and he stated at that time, I believe, that up to July 1, 1943, Mr. Weiss had been his partner, or on two occasions, I believe, he made the same statement, and that subsequent to July 1, Mr. Weiss was the sales manager but that he felt he was entitled to half the profits, and he divided the profits with him, including the \$2 per case received on this Rocking Chair whiskey. I did not have any later conversation than the one in which these documents were

(Testimony of Edward C. Harkins.)

identified with Mr. Goldsmith. I had one conversation later than January, 1944, with Mr. Weiss, on May 14, in this building. Beside myself and Mr. Weiss, Mr. Colvin was present.

Q. What was that conversation?

Mr. Weiss, in his own proper person, objected to the question, on the ground that it was subsequent to the termination of the conspiracy, and hearsay, and that the corpus delicti had not been established. The court overruled the objection, to which the said defendant duly Excepted. [343]

The Witness (Continuing): Mr. Weiss stated that it was true that he received half of the \$2 commission paid to the Francisco Distributing Company for clearing this whiskey through their books, and he finally refused to answer who actually owned the whiskey. He said "I don't want to involve myself." Mr. Weiss said he knew Mr. Blumenthal. He said he knew Mr. Blumenthal, but he refused to state, to the best of my recollection, positively, whether Mr. Blumenthal was the owner of the whiskey or not.

Counsel for the defendant Blumenthal objected to the evidence upon the ground that it was not binding upon the said defendant. The court overruled the objection, to which counsel for the defendant Blumenthal duly Excepted.

Cross-Examination

By Mr. Duane:

I am an agent for the Alcohol Tax Unit. I am a Special Investigator. I have been doing that work

(Testimony of Edward C. Harkins.)

almost 17 years. I was a Prohibition agent at one time. I wrote this case some time ago, and finished it outside of the trial. I referred to a conversation that took place in the office of the Alcohol Tax Unit in September, 1944, at which you were present. Mr. Clay Gaines was present. I did not say that I conducted such conversation as went on at that meeting. I was under the impression that Mr. Johnson was there. Possibly you are right that Mr. Johnson came in and went out. I believe to the best of my recollection Mr. Gaines was there part of the time. (To Mr. Duane): I do not recall that Mr. Gaines said to you at the conclusion of the meeting, "I call your attention, Mr. Duane, to the fact that there have been no notes taken." I remember an expression to the effect that Mr. Gaines said to you, "Mr. Duane, your client is certainly a sap and a sucker." I remember that [344] there was an expression that he was "just used." I remember that you told Mr. Gaines in my presence that I or Mr. Gaines or anybody else would select from the Alcohol Tax Unit any record we have, that Mr. Goldsmith would answer any question he wanted to propound to him, and that the records were open for him. I remember that somebody said to me that there were certain invoices that he would like to have. I remember that you agreed to get the records. I do not know whether or not you subsequently telephoned Mr. Gaines and told him that you had the records in your office. I knew that Mr. Johnson went to your office, but I do not

(Testimony of Edward C. Harkins.)

think he got any records. I am under the impression that he looked at your records, but I don't think he took any. He made an examination of them. I wouldn't say that Mr. Goldsmith at no time has refused to give me any document or information that I wanted; he hasn't refused on any documents. He told me that up until about July 1, 1943, Weiss had been a partner. I believe he described a deal, that he took over his interest and paid him, I believe, or I am under the impression that Goldsmith said he had paid all the money in the first place, and Weiss had paid him back, and then he had returned the money. I don't recall that Goldsmith told me, on this Rocking Chair transaction, that he had sold the whiskey for \$24.50 a case but he said he made \$2 a case. That was his profit and on that profit he gave Weiss \$1. That is exactly correct. The whiskey was billed at \$19.24, the freight is 81c and the State Excise Tax is \$1.92. I never determined when I deduct those figures from \$24.50, how much is left.

Cross-Examination

By Mr. Weiss:

You were in Mr. Colvin's office when I got there. I don't know whether I heard your first statement or not. I recall that you made a statement that a great injustice had been [345] done to you, and that that was why you came to him, to find out if something could be done to rectify it. I can't recollect exactly what was said. My impression is

(Testimony of Edward C. Harkins.)

that Mr. Colvin asked you if you were going to plead guilty. He might have said that if you had a lawyer he would advise you in front of your lawyer to plead guilty. I have considerable recollection of the conversation. I don't know whether you said to Mr. Colvin that had he brought you in as a witness you might be able to tell or remember whatever you know, but he is bringing you in as a conspirator to a charge to which you are not guilty; how does he expect you to plead guilty? I don't recall exactly those words. I don't recall him saying that you would be found guilty, anyway.

Mr. Weiss: Q. However, I said that I was there to find out if justice can be done in this particular case?

A. Yes, I remember that.

Q. And didn't you say to me that you were sort of sorry for me?

A. No, I said I felt rather sorry for Mr. Goldsmith, but I didn't understand how a man owning a business could know as little about his business as he professed to know.

Q. But I was there, I came there voluntarily at this office?

A. Yes, as far as I know.

Q. And I asked Mr. Colvin whether justice could be done in this particular case; that I was indicted, I told him that my wife brought a divorce action against me—do you remember that?

A. Yes, I recall that.

Q. On account of this indictment?

A. I recall.

(Testimony of Edward C. Harkins.)

Q. And that anything in the indictment would not be able to be proved? Do you remember that?

A. You might have made that. I don't recall your making that.

Q. You have sat in this trial and you have heard a man by the [346] name of—this indictment has charged me, Count 8, that on or about the 23d day of November, 1943, at the City and County of San Francisco, State of California, said defendant Samuel S. Weiss, sold to one Victor Figone 200 cases of Old Mr. Boston Rocking Chair whisky. Now, you remember Mr. Figone was on this stand?

A. Yes.

Q. And I looked at Mr. Figone and I asked him to pick out who was Mr. Weiss—

The Court: Now you are commencing to argue the case.

Mr. Weiss: I am sorry. I ask the Court to be reasonable in this matter.

The Court: You ask him any question you want, but try not to make an argument about it.

Mr. Weiss: Q. I was there at my own—I came to his office—

A. You were already there, Mr. Weiss, when I got there.

Q. And I asked if some method could be found where justice would be done to me, that I would be willing to submit if we can arrange some meeting, either with the judge or someone, to discuss this matter; is that correct?

A. Well, I don't recall that part of it. You made

(Testimony of Edward C. Harkins.)

a plea that justice could be done; I remember that.

Q. And he said he thought I should plead guilty.

A. My recollection was that he asked you if you were going to plead guilty, and then if you had an attorney he would advise the attorney.

Q. Advise me to plead guilty? A. Yes.

Thereupon the United States Attorney stated that the Government had no further witnesses to present and that he had some motions to make with regard to the evidence, both documentary and testimonial. Thereupon the Court excused the jury until the following Tuesday morning. Counsel for the Government then stated that he wished to make a motion to admit all of the evidence that had theretofore been admitted against all the defendants. In response to a question by the Court Counsel for each of the defendants stated that they opposed the motion. Thereupon Mr. Friedman on behalf of the defendant Feigenbaum objected to any testimony given by the witness Harkins being admitted in evidence against the defendant Feigenbaum upon the ground that the same were not statements, acts or declarations made in furtherance of the objection of the alleged conspiracy, but were acts and declarations done and said after the termination of the conspiracy, and merely the narrative of the past events.

Thereupon after argument on said objection an adjournment was taken until Monday, May 21, 1945, for motions and further argument, at which time,

in the absence of the jury the following proceedings were taken and had:

Mr. Colvin: Your Honor, for the sake of the record, I take it that the record will show that the Government does offer all evidence which has been admitted against any defendant as against all the defendants, and that further, the Government now makes an offer of all documents marked for identification to be admitted against all the defendants.

The Court: I take it that is the motion to be argued.

Mr. Friedman: That is the way I understood the record.

Mr. Colvin: I further move that the documents, 1 to 14, inclusive, I believe, which have been admitted against individual defendants be admitted as against all. [348]

Mr. Friedman: I understand that the motion, concretely, of the Government at this time is that all testimony and all documents, irrespective of how they came into the record up to this time, be now admitted against all defendants.

Mr. Colvin: That is the motion.

Mr. Friedman: That is my understanding.

The Court: Very well.

Mr. Friedman: To meet the Government's motion, your Honor, it is going to be necessary eventually to discuss some of these exhibits, testimony and proffered documents separately. But I discussed this with other counsel in the case and we feel that probably the best method to pursue at this time would be to call the Court's attention to various

principles of law that we feel are applicable to the offer made by the Government, and the manner in which these principles have been applied by our higher courts

(Argument by Mr. Friedman.)

Mr. Friedman: Bearing these general principles in mind, let us take up this Government's offer now piece by piece. First we come to the one I discussed last Friday, the testimony of Edward Harkins. We object—I say “we”—I mean the defendant Feigenbaum—we object to the admission of this testimony, which was admitted solely against the defendant Goldsmith, as testimony or evidence against the defendant Weiss, on the ground that it calls for a conversation had by Harkins with Goldsmith on two occasions, and testimony had by Harkins with Weiss and Goldsmith on one occasion, as I recall it, in which it is alleged that the defendants Goldsmith and Weiss made certain statements and declarations, all of which were as to past events.

(Argument.)

We object to the admission in evidence against the [349] defendant Feigenbaum of the testimony of Sander as to any conversations he had with Weiss, upon two grounds: First, that part of that conversation and alleged utterances by Weiss were narrative of past events, and upon the second ground that they are declarations of an alleged co-conspirator made out of the presence of Feigenbaum, that they are hearsay, that the corpus delicti of the conspiracy has not been established, and that there is no evidence to show that Feigenbaum was a

member of that conspiracy, and therefore the statements, acts and declarations of a co-conspirator made out of his presence cannot be admitted in evidence against him for any purpose.

(Argument.)

The defendant Feigenbaum objects to the admission in evidence against him of any of the testimony given by the witness Giometti on the ground that it is hearsay, that it calls for acts and declarations of third parties out of the presence of the defendant Feigenbaum, and even the acts and declarations of people that Feigenbaum never even knew or heard of, given at another time, and upon the further ground that the corpus delicti has not been established, and that therefore these matters cannot be competent evidence against Feigenbaum. And during the course of Mr. Giometti's testimony there was introduced for identification Government's Exhibit No. 24, which was an invoice, and Government's Exhibit No. 25, which, I think, was a freight bill, or waybill, of some kind or other. And we object to the admission of Government's Exhibits 24 and 25 in evidence against the defendant Feigenbaum, on the ground they are hearsay, proof of the conspiracy has not been established, that the connection of the defendant Feigenbaum with such conspiracy has not been established at all.

(Argument.)

First having objected in general to all the testimony of [350] Giometti, we now object to this specific portion of Giometti's testimony going into evidence against the defendant here upon the ground

that it is incompetent, irrelevant, and immaterial, that the corpus delicti of the offense has not been established, and it calls for acts and declarations between third persons made out of the presence of the defendant Feigenbaum, and there is no proof he was a member of any conspiracy, or that he authorized, had knowledge of, or ratified any such conversation or acts on the part of Abel.

So far as the testimony of Mr. Reinburg is concerned, we object to the admission in evidence against the defendant Feigenbaum of the testimony given by Mr. Reinburg upon the ground it is hearsay, upon the ground it calls for acts, transactions and events occurring out of the presence of the defendant Feigenbaum, that the corpus delicti of the offense has not been established, and there has been no evidence tending to establish the connection of Feigenbaum with any conspiracy charged or contained in the indictment filed herein, and that the testimony of Mr. Reinburg, so far as any acts, transactions or events he had with the defendant Abel are concerned, that the acts and statements and declarations of the defendant Abel are not binding upon the defendant Feigenbaum for the reasons I have stated.

(Argument.)

During the examination of Mr. Reinburg there was offered for identification Government's Exhibits 22, 23, 34, and 35, 22 and 23 being bills and invoices, 34 and 35 being checks, and we object to the admission of each of these exhibits in evidence as against the defendant Feigenbaum for each and all of the

reasons that we have urged against the admission of the testimony of the defendant Reinburg and the testimony of the defendant Giometti, and upon the further ground that the proper [351] foundation for none of these four documents has been established, and that there was no proof, first, as to the bills and invoices, that they were issued by the Francisco Distributing Company and, secondly, there was no proof that the checks written and given by Giometti and by Reinburg were ever received by the Francisco Distributing Company, or cashed by them. Again I confine, of course, the evidence as it appears against the defendant Feigenbaum.

(Argument.)

I object to the admission in evidence against Feigenbaum of any testimony given by the witness Figone on all the grounds I have heretofore urged as to the admission of some of the testimony, that it is hearsay, that the corpus delicti of the charge has not been established; there is no independent evidence to show that there was a conspiracy, or that Feigenbaum was a member thereof, other than testimony as to the acts and declarations of alleged co-conspirators; that the testimony as to all those transactions and events occurring out of the presence of the defendant Feigenbaum, they are not binding on him, there being no proof he authorized, sanctioned, or even had knowledge of such transactions.

(Argument.) [352]

The Court: Now that this issue has been presented, and it raises a serious question in my mind,

I think I would rather hear from the Government on this point and then you may continue afterwards.

Mr. Friedman: May I state this: In adopting your Honor's statement, I have not receded from my position that even though all this evidence was admitted, nevertheless it should not be admitted.

(Argument by Mr. Colvin.)

(Argument.)

Mr. Riordan: I make the same objection Mr. Friedman made on behalf of the defendant Blumenthal. I do not know whether Mr. Friedman intends to go down the list of witnesses, but if he does not, I want to put the general objection in to the admissibility of any and all documentary evidence other than that allowed in the course of the trial as against the defendant Blumenthal.

The Court: I was not intending to cut Mr. Friedman off from taking the matter up seriatim, but I just thought what we were concerned here with was the general big point, and if it was good, it was good as to each of these points seriatim.

Mr. Friedman: That is the way I understood it. If the necessity arises, I have a right to complete the record.

The Court: I do not think whether you narrated one, two, or a dozen of these particular bits of evidence it would make any difference in the result one way or the other.

Mr. Friedman: I was making specific objections to the particular bits of evidence.

The Court: You may make whatever you think you should make [353] for the record by way of

objection. It may be deemed you are going to point out all the specific items in evidence. I think that might be done without your mentioning them all. I do not know just what you had in mind.

Mr. Friedman: I am always a little bit scary about that, because every once in a while when we get up to the higher court, the court says, "Now, you have made a general objection, and if any part of that evidence was good, your general objection is bad." In other words, when you object generally to a whole line of testimony, if some part of it was admissible, your objection is bad. That is the thing that always scares me.

The Court: If you wish to make your own record you may do so.

Mr. Friedman: I intended to.

The Court: I do not think you need make an argument, but if you wish to point out the specific items of evidence for the sake of the record I do not want to deter you.

Mr. Friedman: That is the way I understood, your Honor.

Mr. Riordan: That is the way I understood it.

The Court: How about the defendant Weiss? Can you add anything to what the lawyers have said in this matter?

Mr. Weiss: I do not know whether I should follow Mr. Friedman's arguments in this case, or follow Mr. Dunne's arguments.

The Court: You can adopt both of them.

Mr. Weiss: If the Court will give me permission, I will adopt both of them at this time. How-

ever, I would like to state for the record that the only person who has testified in this case that I sold him 200 cases of Old Mr. Boston Rocking Chair Whisky was a man by the name of Victor Figone. Now, may the record show that that man testified also I assume before the grand jury that I sold him 200 cases of [354] Old Mr. Boston Rocking Chair Whisky on or about the 23rd day of December, 1943. May the record show that on cross-examination Mr. Figone was asked by Mr. Weiss, Does he see Mr. Weiss or recognize Mr. Weiss in the courtroom, and Mr. Figone said, "No." He has looked around and he doesn't recognize Mr. Weiss. That is all.

The Court: I want to say to you, gentlemen, that the principles of law with respect to conspiracy are pretty well settled. I have had them called to my attention a number of times, and made several of these decisions, many of them, in fact. After all, the precise question that the Court has is whether or not this motion of the Government, under the particular circumstances of this case, should be granted or not. And that depends wholly upon what the circumstances and facts of the case are, set into the background of the body of the law that we have, that you, gentlemen, have discoursed upon. Of course, every case is a little different from every other case. After hearing the arguments and having the record reviewed here, I feel now that the Government's motion should be granted. I think that the facts of the case, all the evidence taken together now is sufficient to show that all the evi-

dence should be admitted, all the exhibits should be admitted against all the defendants, with the exception that I think the testimony that was given by the last witness is admissible against the defendant Goldsmith, but I do not think it should be admitted against the other defendants in the case. It is in the nature of an admission and I do not think it should bind the other defendants.

Mr. Dunne: Your Honor, may I interrupt for the sake of keeping the record straight on that? You will recall that the testimony of the last witness was as to certain conversations with Goldsmith and certain conversations with Weiss. Under [355] your Honor's ruling, you would not permit the conversations with Weiss as against Goldsmith.

The Court: You are right about that. I am glad you called my attention to that. That testimony should be admitted against Goldsmith which pertained to Goldsmith, and against Weiss that testimony which pertained to Weiss.

Mr. Colvin: Then the particular phases of the conversation in which both participated would be admitted as to both.

Mr. Dunne: That is right.

Mr. Colvin: We would have to specify, I suppose, on that.

The Court: That will be the order of the Court, and in order that you may have your record clear, Mr. Friedman, I want you to state any exceptions or objections you have not thus far stated.

Mr. Friedman: I would like to, if I could do it as briefly as possible: I would like to finish out my

specific objections, bearing in mind what your Honor's intention was, and I will ask your Honor to set the ruling aside until I finish my argument. Otherwise I would have to move to strike it out.

The Court: I think the record is sufficiently clear on that, isn't it, that you may be deemed to have made the specific objections which you are now making prior to the granting of the Court's order, or I can set it aside.

Mr. Friedman: The same thing. They get pretty technical on that.

The Court: What we have said is sufficient to show you are making your record on it. Take your objections, and, if necessary, I will reaffirm the order or change it. You may convince me otherwise.

Mr. Friedman: I think this morning I objected to the Reinburg and Giometti testimony, to the Figone and the Avila testimony, as I recall it, and Exhibits Nos. 26 and 27, [356] the check and invoice that were admitted on Figone's testimony. As to Figone, Avila, and these two exhibits, of course, Feigenbaum objects to their admission in evidence against him on all the grounds previously stated, and on the ground they are hearsay as to him; no foundation has been laid for the check or invoice establishing who actually received and deposited the check or who made the invoice; and that the corpus delicti has not been established, there being no proof that Feigenbaum was a member of any conspiracy, and there being no proof of any conspiracy, at all.

As to the witness James Cermusco, upon whose

testimony there were marked for identification Exhibits 27, 28, 29, 30, 31, 32, and 33, I object to the introduction against the defendant Feigenbaum of Cermusco's testimony on the ground it is hearsay, the corpus delicti has not been established, it calls for acts, declarations and events by a third person out of the presence of Feigenbaum. It is not binding upon him, and I object to the admission in evidence of Exhibits 28 to 33, inclusive, upon the same grounds, and likewise upon the ground that no foundation has been laid for such checks, in that there was no proof as to who received or cashed them. There is no proof as to who issued the invoices.

Upon the same grounds I move to strike out the testimony of Vukota and Lewis, on the ground it is hearsay twice removed. These men, the testimony shows, only dealt with Cermusco. They never saw anybody named as a defendant in this case and, as I recall it, anybody connected with the Francisco Company. Their acts, statements and declarations are hearsay as to Feigenbaum, acts and declarations out of his presence, over which he had no control; the corpus delicti of the offense charged has not been established, and that there has been no independent proof identifying Feigenbaum with the conspiracy [357] charged.

The next set of witnesses—and I can deal with them jointly—are Henry L. Taylor, Ruth Taylor, and Raymond C. Humes. This testimony was admitted as to Feigenbaum, and at this time I am going to move to strike it out on the following

grounds, to wit, that such testimony of these three witnesses, all dealing with the same event, is entirely immaterial and incompetent, for the reason that the corpus delicti of the offense has not been established, and upon the further ground that all this showing was an independent, isolated transaction wherein Mr. Feigenbaum agreed to act as the agent for Mr. Taylor and Mr. Hume for the purchase for these people of 200 cases of whisky, and that that was the agreement between the parties, and there was no agreement between Feigenbaum and either Taylor or Humes, or both of them, that Feigenbaum was to sell to either of these parties any whisky.

On like grounds I move to strike out U. S. Exhibit 34, the check for \$4900, testified to as having been written by Mrs. Taylor and delivered to Feigenbaum, and United States Exhibit No. 35, the invoice that was involved in that transaction.

I object to the admission in evidence of the testimony of Walter G. Vogel, together with U. S. Exhibits 45 and 46, which were introduced and marked for identification upon his examination. You will recall that Vogel testified that some strange and unidentified man came into his place and offered to sell him whisky at \$24.50 a case for the Distributing Company, demanding a brokerage for all over that amount. There is absolutely no evidence that this man Vogel knew anybody connected with the charge in this indictment whatsoever, and Vogel's testimony relates to an incident clearly res inter alios acta, hearsay as to the defendant Feigenbaum, the proof [358] of the corpus delicti of

the offense has not been established, and it calls for acts and transactions out of the presence of Feigenbaum, without any evidence to show that he knew, sanctioned, approved or ratified or authorized such transaction, and that goes to the two exhibits 45 to 46, as well as to Vogel's testimony.

I likewise object to the introduction in evidence against Feigenbaum of the testimony of Francis Duffy, together with United States Exhibits 47, 48, and 49, consisting of two checks and an invoice that were marked for identification upon Duffy's examination. The testimony shows that Duffy, who operates a tavern—a man came in, whom he couldn't identify, as I recall it; that he bought from this man 100 cases of whisky at \$24.50 and paid the man a premium of \$20 a case, gave him a check for \$2000, a check for \$2450. The invoice came in, the name of the payee on this check was left in blank, filled in by the man after he went away. The testimony of Duffy is wholly incompetent, absolutely hearsay, *res inter alios acta*, calls for transactions and events out of the presence of the witness Feigenbaum, which he is not shown to have sanctioned, ratified or confirmed, authorized, or approved in any way; that the *corpus delicti* of the charge of the indictment has not been established, or any evidence to show that he was a member of any conspiracy.

I object to the introduction in evidence of the testimony of Angelo Lombardi, together with U. S. Exhibits 50 and 51, which consist of a check written by Lombardi to a man named Minkler, and an invoice. Lombardi testified that in Santa Rosa he

bought 100 cases and gave some cash to Mr. Blumenthal for it. Minkler contacted him about the whiskey. He went to San Francisco and talked to some man there, and so forth. That later on, on the 20th of December, he came to the Sportorium with [359] Minkler. He went into a back room and paid Blumenthal some money. I will object to this testimony, the check, and the invoice, upon the grounds I have heretofore stated, that the matter is purely *res inter alios acta*, is not binding on the defendant Feigenbaum, calls for acts, transactions and events out of his presence, over which he has no control, and they are not binding on him; the *corpus delicti* has not been established, and in this case, as in the others, it calls for the acts and declarations of a co-conspirator made out of the presence of Mr. Feigenbaum, and it is inadmissible, as these other matters are inadmissible for any purpose until the *corpus delicti* has been established by independent testimony. On the same grounds, I object to the introduction in evidence of the testimony given by Herman Fingerhut, together with exhibits 53, 54, 55, 56, and 57, introduced upon his examination. Fingerhut owned a cafe in Vallejo. He said on December 3rd and 4th he saw Blumenthal, bought 200 cases of whiskey at \$55; that later he and Mr. Travis went to the Sportorium and had another deal with Blumenthal.

I object to the testimony of this witness upon all the grounds I have heretofore stated. It calls for the declaration and conduct of an alleged co-conspirator, Blumenthal, out of the presence of

the defendant Feigenbaum, and without any independent proof of the corpus delicti or of Feigenbaum's connection with the alleged conspiracy; upon the further ground it is hearsay, not binding on the defendant Feigenbaum; it constitutes acts that were done without his knowledge, consent, ratification or approval.

I object to the introduction in evidence of the testimony of Walter Travis, together with Government's Exhibits 58, 59 and 60; consisting of two invoices and a freight bill. The testimony of Walter Travis was the same as that of Fingerhut, [360] except that in the first deal Fingerhut took 100 and Travis took 100, and in the second hundred, 75 were for Travis and 25 for Fingerhut.

I object to the introduction of this testimony and the three exhibits I have designated, upon all the grounds I have objected to the testimony of Fingerhut and the checks and invoices involved in Fingerhut's testimony.

I object to the testimony as against the defendant Feigenbaum, of the testimony given by the witness A. P. Jones. Mr. Jones, as I recall, testified to certain Alcohol Tax Unit forms 52-A and 52-B, which were marked Government's Exhibit No. 2 and Government's Exhibit No. 3, and Government's Exhibits 4, 5 and 6. These forms were introduced for the purpose of showing the purchase or lack of purchase of certain whisky by the Francisco Distributing Company during certain months. I object to those forms being in evidence against Feigenbaum, on the ground they are *res inter alios acta*. They

constitute hearsay as to him. No proper foundation has been laid as to any of these forms, and there is no proof they were executed by any alleged conspirator in this case; that they are hearsay as to Feigenbaum, and that they cannot be considered for any purpose in determining his guilt or innocence.

I object to the introduction in evidence against Feigenbaum of the testimony given by the witness Robert Grubbs. Robert Grubbs was connected in some way with the Santa Fe Railway, and he testified to Government's Exhibits 7 and 8, and I object to the introduction of such exhibits in evidence, consisting of two freight bills for two carloads of whisky, on the ground the matter is purely hearsay as to the defendant Feigenbaum. They are acts, transactions and events out of his knowledge, presence or hearing. It is not shown he knew of, ratified, confirmed, authorized or approved, and these matters [361] are wholly incompetent to be considered in determining the guilt or innocence of the defendant Feigenbaum.

~~I likewise move to strike out the testimony of~~ Fred A. Sander, or, rather, I object to the admission of the testimony of Fred A. Sander in evidence against the defendant Feigenbaum, together with United States Exhibits 9, 10, 11 and 12, which were introduced and marked upon the examination of this witness, upon the ground that the testimony of Mr. Sander, who was connected with the San Francisco Warehouse and executed two warehouse receipts, and testified as to certain instructions as

to the disposal of the contents of the cars which he said were represented by these receipts supposed to have been given to him by the defendant Weiss. I object to all the testimony and all these exhibits I have enumerated, upon the grounds that as to the defendant Feigenbaum it is wholly incompetent, irrelevant, and immaterial and hearsay as to him, not binding upon him; that there has been no proof of the corpus delicti or the defendant's connection with any conspiracy, or the conspiracy set forth in the indictment. These matters are merely *res inter alios acta*, and I object to their admission. Additionally, I object to the admission of that portion of Mr. Sander's testimony which has to do with conversations he said he had with the defendant Weiss on December 15th and on December 17th, relative to delivery orders, invoices, and what was to be done with these two cars of whisky, upon the grounds that that evidence constitutes the acts, declarations and statements of an alleged co-conspirator, made out of the presence of the defendant Feigenbaum, and there being no proof of the corpus delicti, the same as that binding on the defendant Feigenbaum.

I likewise object to the introduction in evidence against the defendant Feigenbaum of United States Exhibits 13 and 14, which have to do with certain invoices of a carload of whisky [362] out of a B & O Railroad car, upon all the grounds I have objected to the other portions of the admission of the other railway receipts and instructions, as testified to by Sander under the prior exhibits;

and additionally, I object to the admission against Feigenbaum of the testimony of the witness Sander relative to a conversation he said that he had with Weiss on January 3, 1944, in which the invoices were received by Weiss, and in which Weiss told him to do something about the delivery, on the ground that the testimony as to the acts and declarations of an alleged co-conspirator is inadmissible and not binding upon Feigenbaum, and there has been no independent proof of the corpus delicti of the offense, or Feigenbaum's connection with any alleged conspiracy.

I object to the admission in evidence against the defendant Feigenbaum of the testimony of the witness Frank Dito, of the Bank of America, and likewise the admission in evidence against the defendant Feigenbaum of United States Exhibits 16, 17, 18, 36, 37, 38, 39, 40, 41, 42, 43, 44 and 45. I object to all these matters in the testimony of Dito upon the ground they all have to do with the bank account and the affairs of the Francisco Distributing Company. They are matters and things of which the defendant Feigenbaum is not shown to have had any knowledge, any control over, acts and things done out of his presence, hearsay as to him, and that in every instance no foundation has been laid for the introduction of any of these documents, checks or statements that were introduced under Dito's testimony, for the reason that there has been no preliminary proof as to the endorsers or depositors, and so forth, of the account. And that includes the so-called signature card, which is supposed to

have been the one with which the account was opened for the Francisco Distributing Company in the name of Goldsmith and Weiss. I object to that, which [363] is Government's No. 15, particularly upon all the grounds I have heretofore stated in discussing the exhibits admitted under the testimony of Frank Dito and upon the further ground that no foundation for the signature card has been presented so far as the defendant Feigenbaum is concerned, and there is no proof that either Goldsmith or Weiss signed or executed the same.

I move that there be excluded, and if it has been admitted, that there be stricken out, so far as the testimony of the Witness Joseph Nathanson is concerned, any computation of the figures he has given so far as the so-called ceiling price under the Emergency Price Control Act of whisky is concerned, on the ground it is not the subject of expert testimony. I think I have covered them all.

The Court: The various motions to strike will be denied and exceptions noted. The Court will adhere to its ruling that the evidence and the exhibits will be admitted against all the defendants, save in the case of the testimony of the last witness, Mr. Harkins, whose testimony will be admitted as it relates to conversations with the defendant Goldsmith as to him, and with respect to conversations with the defendant Weiss as to him, Mr. Weiss, and with respect to both of them, where the conversations were had with both of them.

Mr. Friedman: Our exceptions to each ruling are noted.

The Court: Each counsel will have his exceptions.

Mr. Riordan: Do I understand that motion is made on behalf now of all the defendants?

The Court: Oh yes. Let the record show that the specific exceptions that Mr. Friedman has taken with respect to his client made with respect to all the exhibits and testimony [364] are deemed to have been taken by each of the defendants' counsels in like manner and exceptions noted on behalf of each.

Mr. Dunne: Your Honor, we should add to them in some instances with respect to the defendant Goldsmith, with regard to the conversations with the last witness, and we want to state these as objections where the evidence has not gone in, and motions to strike it out where it has gone in, that the testimony is incompetent, irrelevant, and immaterial. The testimony of the extrajudicial statements not part of the *res gestae* of a defendant and an alleged party to the conspiracy is not admissible prior to independent proof as to him of the existence of the conspiracy and the *corpus delicti*. As to the documents, there was no evidence, aside from such extrajudicial statements that brings home to the defendant Goldsmith any knowledge, information or proof that he had any connection with any documents, bank accounts, or anything else, except such extrajudicial statements of the witness Harkins, and accordingly as to him there was no showing of a connection between him

and what purported to be the documents of the San Francisco Distributing Company.

I want to add certain objections to those stated by Mr. Friedman as to Government's Exhibits 2, 3, 4, 5 and 6. There is no identification as to the forms 52-A and 52-B. It is not shown by whom they were made. It appears that they were some place in the files of the witness Jones, or in the files over which he had charge, but there is no showing by any proof of any sort that they were made in the ordinary course of business, no foundation laid for their admission as a record made in the ordinary course of business.

The same goes as to 7 and 8, the freight bills.

Now, without repeating in detail, I do not think [365]—Mr. Friedman can correct me as to this—I do not believe Mr. Friedman made objections to those conversations which were had and the documents introduced in connection with the transactions that were with Mr. Feigenbaum, did you?

Mr. Friedman: Oh, yes, I did.

The Court: He made a motion to strike those.

Mr. Friedman: I made a motion to strike those, because those had already been admitted as against Feigenbaum.

Mr. Dunne: Because, of course, as to things that happened in Feigenbaum's own presence, our position as to things that happened in his presence is Mr. Friedman's position with respect to Feigenbaum as to what happened in Abel's presence, Blumenthal's presence, and so forth. So we want the record to show that as to each item of

evidence in connection with the transactions allegedly participated in by the defendant Feigenbaum, our objection goes that it is incompetent, irrelevant, and immaterial, hearsay, *res inter alios acta*, without foundation, no proof of the corpus delicti, and no independent proof of the connection of any defendant with any alleged conspiracy of which Feigenbaum, or any other party with whom Feigenbaum dealt, was a party.

The Court: The record will also show each of the other defendants has made the same motion, made the same objections with respect to the evidence pertaining to the defendant Feigenbaum.

Mr. Riordan: That is right.

The Court: So the record will be clear on that.

Mr. Dunne: Exception noted as to that.

The Court: Exception noted.

Mr. Dunne: I particularly want to call attention to this fact, and I think I am correct in this, that as to the testimony of Figone and Avila, they had to do with an unknown individual. [366]

The Court: Well——

Mr. Dunne: I think the same thing is true of Cermusco. He could not identify anybody. Figone said he dealt with Weiss, but he did not identify Weiss.

The Court: He conducted his transaction with Cermusco.

Mr. Dunne: Cermusco, an unidentified person, and likewise Vogel. My recollection of the record is that as to those, they were admitted limited to the defendant Goldsmith, so that in respect to those

matters particularly we want our position to be clear, and that is in the nature of a motion to strike out.

The Court: I am glad you called my attention to that. It may be the testimony of those two witnesses should be limited to Goldsmith.

Mr. Dunne: There is no more connection between those men, Vogel, for instance, who talked to Goldsmith, than those who talked to Figone.

The Court: He got the invoice and made the money on that part of the transactions. That, generally, was the way in which the transactions were handled. I think it is admissible against Goldsmith. What is the position of the Government with respect to the testimony of Vogel and Duffy?

Mr. Colvin: Vogel and Duffy—Figone is in a different position, I think. Figone is the man who went to the Francisco Company.

The Court: I am referring to the testimony of Duffy and Vogel, who testified an unidentified man came to their respective places of business and conducted the transactions with them. Is it the position of the Government that their testimony is admissible against all the defendants? [367]

Mr. Colvin: Yes, we take that position at this time, your Honor.

The Court: I think the Court will modify its order to provide that the testimony of these two witnesses will be admitted only as against the defendant Goldsmith.

Mr. Friedman: Upon that ruling, how about Cernusco's testimony?

The Court: That was a little different.

Mr. Friedman: He did not deal with anybody. Some independent, unidentified man came in Cermusco's place of business, talked with Vukota and Lewis, and then he bought some whisky for Vukota and Lewis. That is all the testimony of Cermusco, Vukota and Lewis. It falls identically within the same category as Duffy and Vogel.

The Court: What is the basis for your contention, the Government's contention that the testimony of the two witnesses I have already mentioned, Vogel and Duffy, is admissible against all the defendants in this case? What is the purpose of that? What does that show?

Mr. Colvin: It bears, your Honor, on the question of the identification of the man with whom they dealt. However, the Government's position would be that the circumstances under which they dealt would indicate that their dealings were part and parcel of the same conspiracy that these others were in.

The Court: You mean these men were unknown participants in the conspiracy?

Mr. Colvin: Yes, your Honor, that the particular individuals with whom they dealt were unknown. We concede we have not identified them. But the circumstances of their participation were such that they must have dealt in these two cars as the others did. That is the Government's position [368] on that. We do not feel that the identification of the individuals with whom they dealt is a necessity to that.

The Court: Do you know of any authority that supports that, that in support of an indictment charging conspiracy of certain defendants with unknown persons you could offer in evidence a transaction by an unknown person with a third party, and that that is admissible in the charge set forth in the indictment?

Mr. Colvin: I have no authority on that at this time, your Honor. But it seems to me the point is the fact that they are unidentified is not a qualification; so long as the sales, themselves, were part of this scheme. That is the point—not the fact that they were unidentified. The same details are present which go to the nature of the transactions. The situation at this time is only the individual with whom they dealt it not identified. But if it is part of the same transaction, it is part of the same conspiracy.

Mr. Friedman: Assuming there is a conspiracy.

Mr. Colvin: Yes.

(Discussion between court and counsel.)

The Court: I think I am going to take under advisement the motion with respect to those three witnesses.

Mr. Colvin: That is Vogel, Cermusco, Avila and Duffy? I take it Avila would be in the same category, since Avila's testimony—

Mr. Friedman: And Avila.

Mr. Colvin: I think there is more in the case of Avila.

Mr. Dunne: As to Goldsmith, there is one thing I want to make sure the record is clear on here:

It appearing that the basic permit was in his name, and it appearing that certain transactions were purportedly made under the name of [369] Francisco Distributing Company, we want to object to those as to him upon the ground there is no foundation, because none of those have been brought home to him, either by proof that they were made in the ordinary course of business, or in any other way, to make them admissible as such, that he made them or he had knowledge that they were made, or he had any knowledge whatsoever about them.

I do not know whether Mr. Friedman covered this or not, but we have an objection on the ground it is also *res inter alios acta* and without foundation as to the alleged certificate of doing business under the fictitious name of Francisco.

Mr. Friedman: I covered that Friday.

Mr. Dunne: I think otherwise it is understandable in this record. As I understand the ruling, the purpose of all of this is to present to your Honor the grounds of the objections so your Honor will know what we are talking about.

The Court: Between all of you you have done that.

Mr. Dunne: I think we have done that, and I do not think we are called upon again to go over *seriatim* each item of evidence. But we want our objections and the grounds to appear severally to each document, each item of evidence, each act, an deach transaction as to each defendant.

The Court: Do you gentlemen have any other motions to make?

Mr. Riordan: I was going to ask, so far as I was concerned—but I do not intend to make any extended argument, to say a few words the first thing in the morning. I will just state my motions briefly for a directed verdict. [370]

Mr. Weiss: Your Honor, may the record show that the objections made by Mr. Dunne as to Goldsmith are being made also as to myself, regarding the testimony of Mr. Harkins and all other witnesses?

The Court: I will state for the record for you that you may have the benefit of any of the objections that are made by any of the counsel in connection with this matter that pertain to your particular case, and that you may have an exception to any of the rulings of the Court that pertain to your case.

Thereupon, an adjournment was taken until Tuesday, May 22, 1945, at 10:00 o'clock a.m., at which time the jury being present, the following proceedings occurred:

The Court: Then the Court will state for the benefit of the jury that the Court has granted a motion of the Government to admit all the testimony heretofore offered against all the defendants, with the following exception: [371]

That the testimony of the last witness, Mr. Harkins, is admitted in evidence as against the defendant Goldsmith as to the conversation had by the witness with the defendant Goldsmith; that his testimony is admitted as to the defendant Weiss with respect to conversations with the defendant Weiss;

and as to both defendants, Goldsmith and Weiss, as to all conversations at which both defendants, Goldsmith and Weiss, were present, and exceptions are noted as to this ruling on behalf of all the defendants separately.

Mr. Riordan: And as to this last statement of your Honor's relative to the Harkins testimony, I am given to understand that is limited and does not affect the defendants Blumenthal and the other two or three?

The Court: That is right.

Mr. Friedman: Your Honor, we have several additional motions to make at this time.

The Court: Do you wish the jury excused?

Mr. Friedman: I would suggest that.

The Court: Ladies and gentlemen, there are one or two matters counsel wish to take up in the absence of the jury. The jury may be in brief recess at this time. Bear in mind the admonition of the court.

(The jury was excused from the courtroom and the following proceedings were had in the absence of the jury.)

Mr. Friedman: During the course of the argument yesterday your Honor asked Mr. Colvin whether or not in these transactions where an unknown intermediary was concerned, whether or not he considered this unknown intermediary was on the same footing with the defendants in this case, that is, on the same footing as a conspirator, an agent for the conspirators. He answered yes. While we were objecting to the admission of that testimony on

other grounds yesterday, for the purpose [372] of completing my record I move the Court to strike out, so far as the defendant Feigenbaum is concerned all the testimony given by the witness Victor Figone and by the witness Melvin Avila, together with United States Exhibits 26 and 27, a check and an invoice, on the grounds which we urged against the admission of this testimony originally, and upon the further ground that this testimony constitutes simply the extrajudicial statements and acts and declarations of an alleged co-conspirator said and done out of the presence of the defendant Feigenbaum, and without any proof of his knowledge, authorization or consent to such statements or transactions.

The Court: Inasmuch as I have granted the motion to apply the testimony of these witnesses, as well as all the testimony, as against all the defendants, I will deny this motion. You may have an exception. Do the other defendants wish to join in this motion?

Mr. Dunne: Yes, your Honor.

Mr. Riordan: Yes, your Honor.

Mr. Wolff: Yes, your Honor.

Mr. Weiss: Yes, your Honor.

The Court: It may be so deemed and an exception noted.

Mr. Friedman: I might state in doing this they were not grounds I urged at that time. I will likewise on the same grounds and for the same reasons move that the testimony of the witness James Cermusco, John Vukota, and V. M. Lewis be stricken.

in so far as the defendant Feigenbaum is concerned, upon all the grounds urged against the admission of such testimony, and upon the further grounds that the testimony of these three witnesses merely concern the extrajudicial statements and acts of an alleged co-conspirator, said and done out of the presence of the defendant Feigenbaum, and without [373] any proof of his authorization, knowledge, or consent. That refers to the testimony, together with Government's Exhibits 28, 29, 30, 31, 32, and 33, introduced under such testimony.

The Court: The other defendants join in that motion?

Mr. Dunne: We join in that motion.

Mr. Riordan: Yes, your Honor.

Mr. Wolff: Yes, your Honor.

Mr. Weiss: Yes, your Honor.

The Court: The motion will be denied and exceptions noted for all the defendants.

Mr. Friedman: I likewise move to strike out the testimony of Walter Vogel and United States Exhibits 45 and 46 upon all the grounds heretofore urged as to the admission of such testimony, and upon the further ground that it is merely testimony relating to an extrajudicial act and declaration of a co-conspirator said and done out of the presence of the defendant, and without any proof of his authorization, knowledge or consent thereto.

The Court: Do the defendants join in this motion?

Mr. Dunne: Yes, your Honor.

(The other defendants indicated their assent.)

The Court: The motion will be denied and exceptions noted for all the defendants.

Mr. Friedman: As to the witness Francis Duffy and exhibits 47, 48 and 49, I move that this testimony and these exhibits be stricken out upon all the grounds that I urged for the striking out of the testimony and exhibits given under the testimony of Walter Vogel.

The Court: The same ruling and the same exceptions noted.

Mr. Friedman: Now, if it please the Court, the defendant Feigenbaum at the close of the Government's case in [374] chief now moves the court to instruct and direct the jury to find and return a verdict finding the defendant Feigenbaum not guilty upon each and all of the following grounds, to wit:

1. That the evidence introduced by the Government is insufficient to support either a verdict or a judgment of guilty as to the defendant Feigenbaum.
2. That the offense sought to be charged in the indictment has not been proved by the Government.
3. That the evidence adduced fails and is insufficient to prove the alleged conspiracy set forth in the indictment.
4. That the evidence adduced fails and is insufficient to prove that the defendant Feigenbaum was a member of or identified with the conspiracy sought to be charged in the indictment.
5. That the evidence adduced by the Government does not exclude every other hypothesis except that

of guilt, so far as the defendant Feigenbaum is concerned, and that such evidence is as consistent with his innocence as it is with his guilt.

6. That the only evidence tending to establish the conspiracy charged and Feigenbaum's connection therewith, consists of extrajudicial acts and declarations of alleged co-conspirators, said acts and declarations having been done and made out of the presence and without the knowledge, authorization or consent of the defendant Feigenbaum.

The Court: I have given the same consideration to the motions to adopt all the evidence as I would to this motion. I feel that there is sufficient evidence in this case to have its weight passed upon by the jury. I will deny the motion and allow an exception.

(Argument.) [375]

The Court: I am satisfied that there are sufficient facts in this case in the acts of the defendants, themselves, to show a furtherance, prima facie, of an unlawful design or purpose, and that is why I am denying the motion for a directed verdict at this time.

Mr. Friedman: We note an exception.

The Court: You may have an exception.

Mr. Dunne: If your Honor please, on behalf of the defendant Goldsmith and as to him, I wish to adopt the grounds just stated by Mr. Friedman on behalf of the defendant Feigenbaum, and I likewise, because to some extent the point is the same, desire to adopt the ground urged against the Gov-

ernment's motion for the admission of all this evidence.

So that we won't be too general about it, and so that we shall be within the rule, we should like to state and invoke a ruling upon the motions for the defendant Goldsmith as follows:

The Government has failed to make a case. There has been no evidence against him. There has been a complete failure to prove the charge made in the indictment.

More specifically, there is no direct evidence of any conspiracy or, on the part of the defendant Goldsmith, any knowledge of or participation or act in aid of any alleged conspiracy. That if it can be said there is room for any inference from indirect evidence or circumstantial evidence, if there is any, such evidence is as equally consistent with honesty and legal dealings as with illegality or with the charge made in the complaint, and such evidence, indirect evidence, does not exclude every other reasonable hypothesis and does not exclude or tend to exclude the hypothesis of innocence on the part of the defendant Goldsmith.* So much for the matter generally: [376]

The only thing that has been proved is a series of isolated transactions; that there has been proved no connection between any of them, or any possible connection between them. That is shown only by the extrajudicial statements made by co-conspirators out of the presence and without the knowledge of the defendant Goldsmith.

There is nothing in the evidence in any way to

connect the defendant Goldsmith with any of the transactions, except the direction to the bank to pay certain sight drafts; that anything that was done here or with any documentary evidence, first, even with the testimony of the witness Harkins, upon the ground as to him there is no independent proof of the corpus delicti. There is no independent proof as to the defendant Goldsmith. And to submit the case to the jury upon that testimony would be to submit it and secure a finding solely on the extrajudicial statements of an alleged co-conspirator after the termination of the alleged conspiracy, and in the nature only of an admission and reservation of a past history, and without any other foundation for the testimony of the witness Harkins; there is no connection, whatsoever, in any form.

That there has been no proof of any conspiracy whatsoever, whether joined in by the defendant Goldsmith, or not, except by hearsay testimony, and that as to him there has been no proof, no proof beyond a reasonable doubt, and at this point there has been no proof to overcome the presumption of innocence, and that on the whole the Government has failed to make out a case.

The Court: Very well. The same ruling. Exception.

Mr. Riordan: If your Honor please, I would like to adopt for the defendant Blumenthal the particular motions [377] just made by Counsel Friedman and Counsel Dunne, substituting therefor also instead of the particular witnesses named with respect to extrajudicial statements the failure to estab-

lish the corpus delicti evidence to apply to the witnesses Lombardi, Fingerhut and Travis. I do that in that manner to save the time in repeating those motions, and therefore I adopt all of the motions heretofore made. And I would like to, for the defendant Blumenthal, add the following motions:

In behalf of him I make a motion for a directed verdict for the defendant Blumenthal on the grounds that the said indictment does not state facts sufficient to constitute a crime or offense against the United States of America.

Second, that the Maximum Price Regulations 193 and 445, which the said indictment charged that this defendant, namely, Blumenthal, conspired to violate, are and each of said regulation is so indefinite, not certain, that it is impossible to determine what is meant thereby, or what acts are prohibited thereby, and in part it is impossible to ascertain what price it was lawful at the time mentioned in the said indictment to sell the whiskey at referred to in the said indictment, and by reason of which the said regulations are void; that a conviction under the said indictment would be a violation of the Fifth Amendment of the Constitution of the United States in that no person shall be deprived of life or property without due process of law, and that this Honorable Court, I am respectfully, has no jurisdiction to hear this cause or put the defendant to trial on the indictment.

Second, that the regulation 445, which under its terms, at a date subsequent to the transactions involved in this indictment relative to Rocking Chair

Whiskey, namely, the dates of December and January, 1944, was not passed and in effect until May of 1944, and that it is an attempt upon the [378] part of the Administrator and those adopting the regulations to create an *ex post facto* law.

I further want to make the point, if your Honor please, without arguing it, at least at this time, that the provisions under this special act, out of which these regulations 193 and 445 are created, and the general act itself, the so-called Office of Price Administration Act, has all of the elements in it that allow a transaction of this nature, and that no other act or law of the United States, whether it be civil or criminal, other than the exceptions contained in that act, can be used.

I particularly call that to your Honor's attention because I intend to stand seriously by the point that under the general act there is a provision which sets forth that no violations of the Price Administration can be had by any parties by agreement or otherwise—I am using the general language in there—but an agreement is a conspiracy or a synonym. The lawmakers then go on to set up a structure between Federal officials who can be charged and convicted for a felony. All other persons in the United States can only be convicted of a misdemeanor. And then the act goes on to provide in the third section that any act inconsistent with this General OPA Act shall have no force and effect. And while normally at first glance that might seem very peculiar, that you could toll the famous conspiracy statute, the specialty acts of this nature for a period of time, the

last twenty or thirty years at least, have been laying distinct lines of charges and punishments where they put teeth into those so-called acts, and while it has never been before the higher courts, at this time I raise that point very seriously before your Honor.

(Argument.) [379]

The Court: I will deny that motion and you may have an exception.

Mr. Riordan: Exception.

Mr. Wolff: If your Honor please, on behalf of the defendant Lewis Abel, we desire to make a motion for a directed verdict and also a motion to dismiss the indictment on behalf of the defendant Abel on all the grounds stated by Mr. Friedman, Mr. Dunne and Mr. Riordan, and I move the Court for a directed verdict and a dismissal of the indictment on the following grounds in addition to those already indicated:

The Court: Mr. Wolff, will you kindly speak a little more clearly and slowly? Both Mr. Friedman and I think to some extent Mr. Riordan and Mr. Dunne, as well as yourself, have talked pretty rapidly and the reporter is having a kind of hard time of it.

Mr. Wolff: I would be perfectly willing, your Honor, to indicate this to you, so you will have it, and then hand this copy to the reporter.

The Court: You make the statement, and I think maybe you had better slow up.

Mr. Wolff: I apologize. The indictment fails to state facts sufficient to constitute a violation of Title 18 of the United States Code, section 88 or any

other law or statute of the United States on the part of the defendant Abel.

2. The evidence adduced is insufficient to justify a verdict of guilty against the defendant Lewis Abel.

3. That the evidence adduced fails to show that said defendant committed the alleged violation attempted to be set forth in the indictment, or any violation of said statute or law of the United States.

4. That the evidence adduced does not show that the said defendant conspired with any of the other defendants, [380] or any other persons or person to unlawfully sell at wholesale certain distilled spirits, to wit, Old Mr. Boston Rocking Chair Whisky in excess of a higher than the maximum prices established by law, to wit, \$25.27 per case in violation of section 902(a), 904(a) and 925(b), Title 15, U. S. Code, APS, Office of Price Administration Regulations, Maximum Price Regulation 1943 and Maximum Price Regulation 445, and we ask your Honor for an order so directing the jury.

The Court: The same ruling and the same exception.

Mr. Riordan: The defendant Blumenthal desires to adopt counsel's objections, too, if your Honor please, and avail ourselves of any of those objections.

Mr. Dunne: The defendant Goldsmith adopts the grounds stated by Mr. Wolff and those stated by Mr. Riordan.

The Court: Very well. The record will so show.

Mr. Weiss: I ask the Court if the record might

show that I adopt the motions as made by Mr. Friedman, Mr. Dunne, Mr. Wolff, and Mr. Riordan. I would also like to urge this course specifically as to the testimony of Mr. Victor Figone, who was the only witness in this case whose testimony, if true, would have shown some conspiracy with the others in this particular case. However, the record will show what the testimony of Mr. Figone is, or was, and I would ask the Court to dismiss the case and grant the motion for a directed verdict.

The Court: Your motion also will be denied and an exception granted in favor of the defendant.

Thereupon, counsel for all of the defendants rested their case and renewed their motions made at the close of the Government's case for a directed verdict of not guilty [381] on all the counts theretofore stated at the conclusion of the Government's case. The court denied said motions, to which ruling each of the defendants duly Excepted.

Thereupon, the cause was argued to the jury by counsel for the Government and by counsel for each of the defendants, except the defendant Weiss, who argued the cause in his own behalf.

At the conclusion of the arguments, the Court gave the following oral instructions to the jury:

You have listened, ladies and gentlemen, with commendable attentiveness to the evidence in this case, and to the arguments of the various lawyers who have addressed you. I will ask you to attend on what I have to say as to the applicable law in this case. Of course, you are part of the court. You are a part of the judicial process. You have a dif-

ferent function to perform than that which the law requires me to perform. Our provinces are somewhat different. It is your exclusive function to determine the facts in the case. With that duty on your part I cannot interfere. In like manner, it is my duty to instruct you as to the law. You, in turn, must take the law as I give it to you.

It may be that in the *court* of the trial the court has made some comments in connection with ruling upon objections to testimony as to the reasons for the court's ruling. You are not to draw from any of those statements comments that the court was intending to express any opinion as to the facts of the case, or as to what your decision should be on those facts.

Likewise, the court at times interrogated witnesses, or it may be in some cases admonished witnesses with respect [382] to their answers. You are not to draw from that, either, that the court was intending to take sides, as it were, on the issue of fact. What the court did in that regard was only in carrying out the Court's function, indeed its duty, to supervise and expedite the trial of the case.

And so it is that you are the exclusive judges of the facts, and I have no concern with that. Your own independent judgment is the deciding factor in that regard.

You cannot enter into your consideration of this issue that is to be submitted with any preconceived social, political, or economic theories. Your sworn duty is to decide this case on the facts that you heard here in the courtroom. You are not to say

whether you think the Price Law is a good law or a bad law: You are to accept the statement of the court as to the law. Your duty is to take the law the way you find it, the way it is given to you by the Court. You are not to make your decision in this case upon general principles. That is not the function of the juror.

Also I think it is well to call your attention to the fact that you cannot let enter into your consideration of this case any likes or dislikes you may have as to the kind of business the defendants are engaged in, who they are, what religion they have, or how they look to you. That would be letting prejudice enter into your decisions, and that you should not do.

There are some general principles of law that are applicable to all criminal trials. I will briefly call your attention to some of them. I have already told you that you must exclude any prejudices from your mind. You said on your voir dire examination that you hadn't any, and in like manner you must exclude any considerations of sympathy from [383] your consideration of the facts of the case. You are not to concern yourself with the matter of the punishment of the defendants or any of them, in the event of a verdict of guilty as to any of them. The matter of punishment is for the court alone. Your province is only to determine the guilt or innocence of the defendants.

I told you at the time that you were impaneled, and I repeat it now, that there is no presumption of any kind that because the defendants, or any of

thm, have been indicted by the grand jury, that the defendants, or any of them, are guilty. At all stages of this proceeding the defendants and each of them are presumed to be innocent. This presumption continues until the evidence introduced for or on behalf of the Government proves their guilt or the guilt of any of them beyond a reasonable doubt.

The determination of a charge in a criminal case involves the proof of two separate and distinct propositions: First, that the crime that is charged in the indictment was committed; second, that it was committed by the person accused thereof and on trial therefor. These two propositions, and every essential and material fact necessary and correlative thereto, must be established by the Government to a moral certainty and beyond a reasonable doubt.

Now, the question is, of course, what is a reasonable doubt? A reasonable doubt is a doubt raised upon the judgment and reason of him who conscientiously entertains it from the evidence in the case. It is a doubt based upon reason. By such a doubt is not meant every possible or fanciful conjecture that may be suggested or imagined, but a fair doubt based upon reason and common sense, and arising out of the evidence presented.

In every crime there must exist a union or joint operation of act and intent, and for conviction both elements must be [384] proved to a moral certainty and beyond a reasonable doubt. Such intent is merely the purpose or willingness to commit such an act. It does not require any knowledge that such act is a violation of the law. However, a person is

presumed to intend to do all that which he voluntarily and willfully does in fact do, and must also be presumed to intend all the natural, probable and usual consequences of all his own acts.

In judging the evidence, you are not bound to decide in conformity with the statements of any number of witnesses which do not prove conviction in your mind against a lesser number or against a presumption or greater evidence satisfying your minds.

The testimony of an accomplice or a co-conspirator or evidence of oral admissions of a defendant must be received with caution by you. In this case, that is, the case that you are now hearing, proof of the conspiracy charged in the indictment against the defendants must be made independent of admissions of any defendant made after the termination of the alleged conspiracy.

The rule of reasonable doubt that I gave to you a moment ago applies to every material element of the offense charged in the indictment.

Whether or not you believe the witnesses who have testified in this case and the weight to be attached to their testimony respectively, is a matter for your sole and exclusive judgment. We start out with the presumption in law that the witness is presumed to speak the truth. However, this presumption may be negatived by the manner in which he or she testifies, by the character of his or her testimony, contradictory evidence, or by his or her motives.

In passing upon the credibility of the various wit-

nesses, it is your right to accept the whole or any part of [385] their testimony, or discard or reject the whole or any part thereof. If it has been shown to you that a witness has testified falsely on any material matter, you should distrust his or her testimony in other particulars. In that event you are free to reject all of the witness' testimony. In scrutinizing, examining and considering the testimony given, the Court suggests to you that the following are standards or criteria by which you can measure the testimony of witnesses: First, consider the circumstances under which the witness testifies; second, his or her demeanor or manner on the stand; third, his or her intelligence, also the connection or relationship which he or she bears to the Government, or to the defendants, or any of them, and also the manner in which he or she might be affected by the verdict; and finally, the extent to which he or she is contradicted or corroborated by other evidence, if at all.

Ladies and gentlemen, you must disregard entirely any testimony stricken out by the Court, or any testimony to which an objection has been sustained. Any document or exhibit which has been admitted for a limited purpose may be only considered by you in connection with that purpose. Testimony which has been admitted only to apply as to a specified defendant may only be considered by you as to that defendant and none other.

In this case, the attorneys who have argued the case have commented upon and have argued upon the evidence. If you find any variance between the

facts testified to by the witnesses and what has been stated to you by counsel to be the facts, to the extent of such variance you must consider only the facts testified to by the witnesses.

In the course of a trial, as in this case, which has run a number of days, and several hundred pages of transcript, [386] as I understand, you may find some discrepancies or inconsistencies in the testimony of a witness, or perhaps between the testimony of different witnesses. If such discrepancies or inconsistencies are not material and they do not affect the true issues of this case, and if they do not reasonably bear upon the guilt or innocence of the defendants, or any of them, do not waste your time in considering them. You should finally use your good judgment, and your good sense also, just as you would in acting upon the most vital and important matters pertaining to your own affairs. You should resolve the facts of the case according to calm, deliberate and cautious judgment, in the light of your own knowledge of the natural tendencies and propensities of human beings. Remember that the defendants, and each of them, are entitled to any reasonable doubt that you may have in your minds. At the same time also remember that if you have no such doubt the Government is entitled to a verdict.

None of the defendants in this case have taken the stand. You must not draw any unfavorable inference from that fact, for under our law a defendant is not required to testify. Neither the prosecution nor the court can or should comment un-

favorably because of any defendant's silence. That is his constitutional and lawful right.

Now, in this case there are five different defendants that are on trial here, all charged with having conspired to violate a law of the United States. Now, let me say to you ladies and gentlemen, that although all of the defendants are charged jointly, that is, by one charge in one indictment, the guilt or innocence of each defendant must be determined by the jury separately. Each defendant has the same right to that kind of consideration on your part as if he were being tried alone. [387]

Some mention has been made by counsel and some discussion by some of them on the subject of circumstantial evidence, and what it means.

Let me say to you that there are two classes of evidence recognized and admitted in courts of justice, upon either of which juries may lawfully find an accused guilty of crime. One is direct or positive testimony of the commission of the crime, and the other is proof in testimony of a chain of circumstances pointing sufficiently strong to the commission of the crime by the defendant, and which is known as circumstantial evidence. Evidence of both classes has been introduced in this case. Such circumstantial evidence may consist of statements by a defendant, plans laid for the commission of the crime—in short, any acts, declarations, or circumstances admitted in evidence tending to connect a defendant with the commission of a crime. There is nothing in the nature of circumstantial evidence that renders it less reliable than the other class of evidence.

If, upon consideration of the whole case you are satisfied to a moral certainty and beyond reasonable doubt of the guilt of the defendant, you should so find, irrespective of whether such certainty has been produced by direct evidence or by circumstantial evidence. The law makes no distinction between the two classes of evidence in the degree of proof required for conviction. It does require, no matter which form of evidence convinces you, that you must be satisfied beyond a reasonable doubt and to a moral certainty.

However, in a case of this type, involving, as it does, a charge of conspiracy, in order to justify a jury in finding a verdict of guilty based entirely on circumstantial evidence, the circumstances must not only be consistent with the guilt of the defendant, but they must be inconsistent with [388] any other reasonable hypothesis that can be predicated on the evidence. In other words, not only must each fact relied upon to show the guilt be proved beyond a reasonable doubt, but such fact must be consistent with all the other facts introduced in the chain of circumstances, and must further be inconsistent with any other rational conclusion than that of guilty.

Now, ladies and gentlemen, the indictment in this case charges the defendants with a conspiracy to sell over the ceiling price certain commodities, that is, over the ceiling price established by the Office of Price Administration, or, rather, according to the formula provided by the Office of Price Administration for the fixing of ceiling prices. I should like to call your attention at this time to certain pro-

visions of the law, not with respect to the conspiracy, but with respect to the price law that is here involved, to the extent to which it is involved. A section of the Federal statute provides:

"Whenever in the judgment of the Price Administration the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this act—that is, the Price Control Act—he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purpose of this act."

The Administrator of the Price Law, pursuant to that authority, adopted and promulgated certain regulations with respect to maximum ceiling prices of various commodities, [389] and these Maximum Price Regulations generally provided that no person could buy or sell above the maximum prices, and that the maximum prices established could not be evaded by direct or indirect methods, whether by finder's fee, brokerage, commission, service, transportation, or other charge or discount, premium or other privilege. Violation of the maximum prices established by the Price Administrator pursuant to the authority vested in him by statute, if willfully and fraudulently done, is made by the law a criminal offense. In this case I will instruct you that the maximum price at which a wholesaler should sell the whiskey which is described in the indictment was \$25.27 per case.

Now, the defendants in this case are not charged

in this indictment with the violation of the Price Control Act as such. They are not charged with selling a commodity in violation of the regulations established by the Price Administrator. Even if the evidence in this case convinced you to the fullest extent that they were guilty of such an act, you could not find them, by virtue of that fact alone, guilty of the charge contained in this indictment. This indictment charges the defendants, not with the substantive offense of selling a commodity over the ceiling price and in contravention of a regulation of the Price Administrator, but it charges the defendants with a conspiracy to do that. By a law enacted a long time ago by our Congress, a conspiracy was made an offense against the law in and of itself. The statute reads as follows:

"If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the objects of such conspiracy," [390] all of the parties to said conspiracy shall be punished as the law provides. In other words, ladies and gentlemen, these defendants are charged with a conspiracy, an agreement to do an unlawful act, to accomplish an unlawful end. The agreement, itself, the conspiracy, itself, is the substantive offense. That being the case, it is important for you to know what the rules of law are that should guide you in determining the fact as to whether or not the defendants are guilty or not guilty of the conspiracy charged.

In order to establish the crime charged, that is, the conspiracy charged in the indictment, it is necessary, first, that the conspiracy or agreement to commit the particular offense against the United States as charged in the indictment be established; and, secondly, to prove further that one or more of the parties engaging in the conspiracy *was* committed some act to effect the object thereof.

To constitute a conspiracy it is not necessary that two or more persons should enter into an express agreement for the unlawful venture or scheme, or that they should directly state between themselves or otherwise what the unlawful plan or scheme is to be, or the details thereof, or the means by which the unlawful combination is to be made effective. It is sufficient if two or more persons, in any manner, positively or tacitly come to a mutual understanding to accomplish a common and unlawful design. In other words, when an unlawful end is sought to be effected, and two or more persons, actuated by the common purpose of accomplishing that end, work together in any way in furtherance of the unlawful scheme, every one of such persons comes a member of the conspiracy. The success or failure of the conspiracy is immaterial, but before a defendant may be found guilty of the charge it must appear beyond a reasonable doubt that a conspiracy was formed, as alleged in the [391] indictment, and that the defendant was an active party thereto.

In order to warrant you in finding a verdict of guilty against the defendants, or any of them, it

is necessary that you be satisfied beyond a reasonable doubt that a conspiracy as charged in the indictment was entered into between two or more of the defendants to violate the law of the United States in the manner described in the indictment. It is unnecessary further that, in addition to the showing of the unlawful conspiracy or agreement, the Government prove to your satisfaction, beyond a reasonable doubt, that one or more of the overt acts described in the indictment was done by one or more of the defendants, or at their direction, or with their aid, to effect the object of the conspiracy.

Under the charge made, the conspiracy constitutes the offense, and it must be made to appear from the evidence, beyond a reasonable doubt, before any defendant can be convicted, that such defendant was a party to the conspiracy and unlawful agreement charged, and that he continued to be such up to the time that overt acts were committed, if the evidence shows that there were any such. The mere fact that either or any of the defendants named may have engaged in the performance of any of the acts charged in the indictment as overt acts, would not authorize a conviction by reason of that fact, alone, but it is necessary to show that such defendant or defendants were parties to the conspiracy and unlawful agreement before their guilt of the offense charged is made out.

Each party must be actuated by an intent to promote the common design. If persons pursue by their acts the same unlawful object, one per-

forming one act and a second another act, all with a view to the attainment of the object they are pursuing, the conclusion is warranted that they are engaged in a conspiracy to effect that object. Cooperation in [392] some form must be shown. There must be intentional participation in the transaction, with a view and purpose to further the common design. And if a person, understanding the unlawful character of a transaction, encourages, advises, or in any manner, with a purpose to forward the enterprise or scheme, assists in its prosecution, he becomes a conspirator. And so a new party, coming into a conspiracy after its inception, with knowledge of its purpose and object, and with intent to promote the same, becomes a party to all of the acts done before his introduction into the unlawful combination, as well as to the acts done afterwards. Joint assent and joint participation in the conspiracy may be found, like any other fact, as an inference from facts proved.

Where the existence of a criminal conspiracy has been shown, every act or declaration of each member of such conspiracy, done or made thereafter pursuant to the concerted plan and in furtherance of the common object, is considered the act and declaration of all the conspirators, and is evidence against each of them. On the other hand, after a conspiracy has come to an end, either by the accomplishment of the common design, or by the parties abandoning the same, evidence of acts or declarations thereafter made by any of the conspirators

can be considered only as against the person doing such acts or making such statements.

In that connection, you will recall that I advised you during the trial of the case that the statements made by the defendants Goldsmith and Weiss to the witness Harkins could only be considered by you as against those two named defendants.

The declaration or act of a conspirator not in execution of the common design, is not evidence against any of the parties other than the one making such declaration. [393]

The evidence in proof of the conspiracy may be circumstantial. Where circumstantial evidence is relied upon to establish the conspiracy, or any other essential fact, it is not only necessary that all the circumstances concur to show the existence of the conspiracy or fact sought to be proved, but such circumstantial evidence must be inconsistent with any other rational conclusion. That is, you are to consider all of the circumstances and conditions shown in evidence, and if it appears to you as reasonable men that, even though there is no direct evidence of the actual participation in the alleged offense by the defendants, or either of them, a reasonable inference from all of the facts and circumstances does to your minds, beyond a reasonable doubt, show that the defendants, or some of them, were parties to the conspiracy as charged, then you should make the deduction and find accordingly.

It is not necessary that it be shown that any person concerned in the alleged conspiracy profited

by the things which he did, but if any of the defendants, with knowledge that the law was designed to be violated in the particular manner charged in the indictment, aided in any way by affirmative action in the accomplishment of the unlawful act, they would be guilty.. To this statement there is but one exception, and that is, if before any overt act has been committed on the part of any conspirator or at his suggestion, or with his aid or participation, any such conspirator withdraws from the conspiracy and wholly disassociates himself from the project, or the carrying out thereof, he ceases to be a conspirator and is without guilt.

An overt act need not be criminal in nature, if considered separately and apart from the conspiracy; it may be as innocent as the act of a man walking across the street, [394] or driving an automobile, or using a telephone. But, if during the existence of the conspiracy, the overt act is done by one of the conspirators to effect the object of the conspiracy, the crime is complete, and it is complete as to every party found by you to be a member of the conspiracy, no matter which one of the parties did the overt act.

It is not necessary that all the overt acts charged be proved, but it is necessary that at least one of these be proved, and that it be shown to have been in furtherance of the object of the conspiracy. Other overt acts than those charged may be given in evidence, but proof of one of those charged in the indictment is indispensable.

Now, ladies and gentlemen, if you can conscien-

tiously do so you are expected to agree upon a verdict. You should freely consult with one another in the jury room. If any one of you should be convinced that your view of the case is erroneous, do not be stubborn and do not hesitate to abandon your own view under such circumstances. On the other hand, it is entirely proper to adhere to your own view if after a full exchange of ideas you still believe you are right. In this case, as I have already told you, there are five defendants. Having in mind all the instructions and rules of law that I have given to you, you may find all the defendants guilty, or all the defendants not guilty. You may find any one of the defendants either guilty or not guilty, in accordance with the rules and statements as to the law that I have given to you.

The court desires finally to caution you that if it becomes necessary for you to communicate with the court during your deliberations, or upon your return to court, with respect to any matter connected with the trial of this case, you should not indicate to the court in any manner how the jury stands numerically, or otherwise, on the question of the guilt or [395] innocence of the defendants, or any or either of them. This caution you should observe at all times after the case is submitted to you until you have reached a verdict. Whenever all of you agree to a verdict, it is the verdict of the jury. In other words, you must come to a unanimous decision. When you retire to the jury room to deliberate you should select one of your

number as foreman or forelady, as the case may be, and he or she will sign your verdict for you when it has been agreed upon, and he or she will represent you as your spokesman in the further conduct of this case in this court.

Thereupon, counsel for the defendants noted the following Exceptions to the charge of the Court:

Mr. Friedman: I will be as brief as possible. If the Court please, at this time I desire to note certain exceptions to the court's charge, and certain exceptions to the failure of the court to charge on certain principles of law, all on behalf of the defendant Feigenbaum.

First, I desire to note an exception to that portion of the charge which informed the jury that a person is presumed to intend the natural and probable consequences of his voluntary acts. I make that upon the ground that the crime of conspiracy involves a specific intent, and the presumption of intention as embodied in the court's instruction does not apply.

I desire to note an exception to that portion of the court's charge which told the jury that if they found any inconsistencies in the testimony of any of the witnesses that did not bear upon the defendant's guilt or innocence and was inconsequential, that they should disregard it. I note an exception to that on the ground that the jury have a right to consider even inconsequential inconsistencies in determining the credibility of a witness.

I likewise desire to note an exception to the court's charge dealing with the crime of conspiracy,

in which the court told the jury that if two persons, even acting independently, or words to that effect, were acting toward the accomplishment of the same and common end, that that constituted a conspiracy. I note an exception to that on the ground that such is not the law of conspiracy. There must be only a concert of intent and a concert of action, but that the parties must intend to bring about a result common——

The Court: Please do not argue, Mr. Friedman. You know we have a jury waiting. Just note your exceptions.

Mr. Friedman: I desire to note an exception to the court's failure to give Feigenbaum's instruction No. 3, which has to do with the fact that sellers do not conspire with buyers; likewise Feigenbaum's instruction No. 4——

The Court: Your instructions are numbered, as I recall it.

Mr. Friedman: Oh, yes.

The Court: I will file them and you will have a means of identifying them in the record; so you need not refer to them except by number.

Mr. Friedman: If that is understood, the court knows what the subject is of the instructions, so if I have to go upstairs they may not say, "You did not call to the court's attention what it is all about."

The Court: I have read over the instructions, and I will say to you that I decided to give my own instructions on the matter, so you could just run down them by number.

Mr. Friedman: All right, I desire to note an exception to the court's failure to give Feigenbaum's requested instruction No. 4; likewise requested instruction No. 5, which deal with the same subject matter as No. 3; likewise his requested instruction No. 6, which deals with the same subject [397] matter; likewise requested instruction No. 7; likewise Feigenbaum's requested instruction No. 8.

On this I would like to mention to your Honor, because you might reconsider it, Feigenbaum's requested instruction No. 8 was if they found that Feigenbaum only conspired with Taylor and Humes to do certain acts, that that was not the conspiracy charged in this indictment. Feigenbaum instruction No. 8:

I desire to note an exception to your Honor's refusal to give Feigenbaum's requested instruction No. 20, which simply means if all the evidence, whether direct or circumstantial, is equally compatible with innocence, they must return a verdict of not guilty.

I likewise desire to note an exception to your Honor's refusal to give Feigenbaum's requested instruction No. 22—I will withdraw that about 22; your Honor covered it after I had marked it.

And lastly, I desire to note an exception to your Honor's refusal to give Feigenbaum's requested instruction No. 26, which is on the law of circumstantial evidence, and which, while your Honor instructed on all phases of it, you did not tell the jury they must follow the hypothesis of innocence which is contained in that construction.

Lastly, I desire to note an exception to the refusal to give Feigenbaum's requested instruction No. 27; likewise requested instruction No. 28; and likewise requested instruction No. 29, which are to the effect that in considering whether or not there was a conspiracy, of which Feigenbaum was a member, no acts or declarations of any alleged co-conspirator made or done out of his presence could be considered in determining either the conspiracy or his connection therewith. [398]

The Court: All your exceptions will be noted, Mr. Friedman.

Mr. Dunne: If your Honor please, in so far as Mr. Friedman stated exceptions to the charge as given, on behalf of the Defendant Goldsmith we desire to adopt them. I take it that it will not be necessary to repeat them. Your Honor has them in mind.

The Court: Yes.

Mr. Dunne: Very well. On behalf of the defendant Goldsmith, further, we respectfully except to the instruction of the court in defining "intent", which in substance and effect told the jury that intent does not require knowledge, that the act in question is a violation of the law, upon the ground that a conspiracy to violate the OPA statute, the statute here in question, does require specific intent, and that particularly in respect to the defendant Goldsmith it requires in intent to agree to deliver over the ceiling price, and requires knowledge of the ceiling price.

Your Honor further instructed; and to this we

respectfully except, that a party who with knowledge of the design furthers it, is guilty of a conspiracy, both upon the ground that mere aid, without some knowledge of an unlawful act and information that the thing is going to be used illegally, does not make him a party to a conspiracy, nor does it make him a party to a conspiracy even if he knows there is a conspiracy to act unlawfully.

We respectfully note an exception to your Honor's instruction that the jury are at liberty to find one defendant guilty although it finds the other defendants not guilty, on the ground that under the indictment and evidence in this case the jury must return a verdict of guilty as to two defendants at least or all defendants must be found not guilty.

The Court: Mr. Dunne's exceptions will be noted.

Mr. Riordan: May I adopt counsels' exceptions in each instance? That will save a lot of time. And now I have only these two suggested matters that I would respectfully request your Honor to give instructions on, as the evidence has been adduced here. I do not know whether instructions were handed in by us individually. I would say to your Honor I would like an instruction to this jury that such admitted co-conspirators as Travis and Figone and, without going into too many of those, Fingerhut, that their testimony, because of that condition, should be viewed with caution. I used "great caution" in my argument, but to be extremely tactful, it should be viewed with caution. That is one suggestion to your Honor.

The other is, if a witness is false in one material

statement of his or her testimony, the jury has a right to disregard all of the testimony. Those two instructions I respectfully ask your Honor to give, and if you do not think those should be given, I should like, respectfully, to note an exception.

The Court: I already gave those.

Mr. Riordan: Both of those?

The Court: Yes.

Mr. Riordan: I am a little hard of hearing.

The Court: However, the exception will be noted.

Mr. Riordan: The exception will be noted if they were not given.

The Court: Yes, the exception will be noted.

Mr. Abrams: Your Honor, on behalf of the defendant Abel, let the record indicate that the defendant Abel makes the same exceptions heretofore interposed by Mr. Friedman on behalf of his client, defendant Feigenbaum, and by Mr. Dunne [400] on behalf of his client, defendant Goldsmith, and by Mr. Riordan on behalf of his client, defendant Blumenthal; and may it be deemed and considered that the same exceptions noted by them to your Honor's instructions will be noted on behalf of the defendant Abel? And, in addition to that, your Honor, may we have an exception to your Honor's refusal or failure to give instructions requested by the defendant Abel, numbered 1, 8, 13, 23, 24, 25, 26, 27 and 28?

The Court: Very well. Those exceptions will be noted.

Mr. Riordan: May I adopt Mr. Abrams' exceptions, to protect the record?

The Court: If all of you want to adopt each other's exceptions, let the record so show.

Mr. Dunne: Yes, if Your Honor please. Thank you.

Mr. Friedman: I am not his counsel, but may I suggest that the court give to Mr. Weiss all the exceptions that everybody else have?

The Court: Let the record show that Mr. Weiss may have the same objections and all the exceptions that have been taken by other counsel, as if they had been made by him.

(Note: There was an Exception taken to the refusal to give certain instructions proposed by defendant Abel.)

Defendant Feigenbaum's instruction No. 3 referred to by Mr. Friedman is as follows:

The indictment in this case charges the defendant Feigenbaum with having conspired with Louis Abel, Lawrence B. Goldsmith; Samuel S. Weiss and Harry Blumenthal, to unlawfully sell, at wholesale, certain Old Mister Boston Rocking Chair Whiskey in excess of and higher than the maximum price [401] established by law. If you find from the evidence that the defendant Feigenbaum merely purchased or agreed to purchase certain cases of Old Mister Boston Rocking Chair Whiskey from any other defendant in this case or that the defendant Feigenbaum merely acted as the servant or agent or for or on behalf of one L. H. Taylor and/or one R. C. Humes for the purpose of purchasing for them certain Old Mister Boston Rocking Chair

Whiskey from one or more of the other defendants in this case, and if you further find that the said defendant Feigenbaum was not acting as the servant, agent or employee of any other defendant named in this case, for the purpose of selling said whiskey, then you must return a verdict herein finding the defendant not guilty."

Defendant Feigenbaum's requested instruction No. 4 is as follows:

"Before you can find any defendant guilty in this case, it is necessary that the prosecution establish to a moral certainty and beyond a reasonable doubt that the conspiracy set forth in the indictment existed and that any such defendant was a member of that particular conspiracy. The conspiracy relied on by the Government in this case is one wherein the defendant Lawrence G. Goldsmith, doing business as the Franciscan Distributing Company, was the owner and seller of the Old Mister Boston Rocking Chair Whiskey described in the indictment and that the defendants in this case did conspire with each other to sell the particular Old Mister Boston Rocking Chair Whiskey that was acquired and owned by the defendant Lawrence B. Goldsmith. If you find that the defendant Feigenbaum in this case may have agreed with some person other than the defendants in this case to sell to such person cases of Old Mister Boston Rocking Chair Whiskey and [402] that the said Feigenbaum, in order to make said sale to said third person, did buy from one of the defendants in this case, cases

of such whiskey, and you do not find anything more on behalf of the defendant Feigenbaum, you must return a verdict herein finding the defendant Feigenbaum not guilty for the reason that he never became a member of the conspiracy charged in the indictment relied on by the Government, even though you should find that the sale of such whiskey by Feigenbaum to such third person was in excess of the maximum price established by law for such sale."

Defendant Feigenbaum's requested instruction No. 5 is as follows:

"If you find from the evidence in this case that the acts and conduct of the defendant Albert Feigenbaum amounted to no more than an action on his part to purchase, either for himself or for some other person, Old Mister Boston Rocking Chair Whiskey, and that he did so purchase said whiskey, then you must find that the defendant Feigenbaum was not a member of the conspiracy set forth and charged in the indictment and you must return a verdict herein finding the defendant Feigenbaum not guilty."

Defendant Feigenbaum's requested instruction No. 6 is as follows:

"I instruct you that where a transaction consists on the one hand of the selling of an article, that is either prohibited by law or that is being sold in a manner that violates the law, and on the other

hand by the purchase of such article by another person, then, under such circumstances, the buyer and the seller are not guilty of a conspiracy to sell such article. Therefore, if you find from the facts in this case that the transaction involved amounted on the one hand to some of the defendants, other than Feigenbaum agreeing [403] to sell the whiskey described in the indictment at a price prohibited by law, and on the other hand that the defendant Feigenbaum merely agreed to purchase for himself or for some other person, some of said whiskey at said price, then you must find that the defendant Feigenbaum was not a member of any conspiracy that had for its object the selling of said whiskey, he being merely a purchaser or agent for the purchaser thereof. Under the circumstances you must return a verdict finding the defendant Feigenbaum not guilty."

Defendant Feigenbaum's requested instruction No. 7 is as follows:

"If you find from the evidence in this case that the defendant Feigenbaum did agree with a man named H. L. Taylor and/or with a man named R. C. Humes to sell to either or both of such persons certain Old Mister Boston Rocking Chair Whiskey at a price in excess of the maximum price established by law, but if you also find that the defendant Feigenbaum had not agreed with any other defendant in this case to sell any Old Mister Boston Rocking Chair Whiskey at a price above that provided by law, then you must return a verdict herein

finding the defendant Feigenbaum not guilty on the ground that he was not a member of the conspiracy charged in the indictment."

Defendant Feigenbaum's requested instruction No. 8 is as follows:

"I instruct you that the defendant Albert Feigenbaum is not on trial for conspiring or agreeing with H. L. Taylor or R. C. Humes to sell to said R. L. Taylor or R. C. Humes, Old Mr. Boston Rocking Chair Whiskey at a price in excess of the maximum price established by law. If the evidence in this case only establishes or tends to establish that the defendant Feigenbaum only conspired and agreed with [404] H. L. Taylor and R. C. Humes to sell said whiskey, at a price in excess of the maximum price established by law, you must return a verdict finding the defendant Feigenbaum not guilty as that would not be the conspiracy charged in the indictment and for which the defendant Feigenbaum is on trial."

Defendant Feigenbaum's requested instruction No. 20 is as follows:

"Where an act may be attributed to a criminal or an innocent cause, it is the duty of the jury to attribute the act to the innocent cause rather than to the criminal one. A crime is never presumed where the conditions may be explained upon an innocent hypothesis. It is the duty of the jury, to reconcile, if possible, all circumstances shown in evidence with the innocence of each defendant and

to account for all facts, if possible, upon the hypothesis that the defendant is not guilty."

Defendant Feigenbaum's requested instruction No. 22 is as follows:

"When independent facts and circumstances are relied upon to establish, by circumstantial evidence, the guilt of a defendant, each material, independent fact or circumstance in the chain of facts relied upon must each be established to a moral certainty and beyond a reasonable doubt. If in the chain of facts of circumstantial evidence any one or more of the material facts in such chain are not established to a moral certainty and beyond a reasonable doubt, the entire proof fails and a verdict of not guilty must be returned."

Defendant Feigenbaum's requested instruction No. 26 is as follows:

"The evidence in this case on which the prosecution relies is circumstantial evidence. Where the evidence relied on for a conviction is circumstantial such evidence [405] must be not only consistent with the hypothesis of guilt but inconsistent with any other rational hypothesis. Therefore, if you find in this case that the evidence leads to two opposing and rational conclusions, one that the defendant Feigenbaum is guilty and the other that the defendant is not guilty, it is your duty to adopt the conclusion that the defendant is not guilty and return a verdict finding the defendant Feigenbaum not guilty."

Defendant Feigenbaum's requested instruction No. 27 is as follows:

"In order for you to find the defendant Albert Feigenbaum guilty of the crime of conspiracy as charged in the indictment it is necessary that you find, among other things, to a moral certainty and beyond a reasonable doubt that a conspiracy existed between at least two persons to do the things set forth in the indictment and that Albert Feigenbaum was a member of such conspiracy. In determining whether such conspiracy existed and that Feigenbaum was a member of such conspiracy you cannot take into consideration and must disregard all testimony and evidence relating to the acts and declarations of any alleged conspirator, other than the defendant Feigenbaum, said or done out of the presence of the defendant Feigenbaum. The existence of the conspiracy charged and Feigenbaum's connection therewith must be established by evidence independently of the acts and declarations of any alleged co-conspirator of Feigenbaum's said or done out of the presence of the defendant Feigenbaum."

Defendant Feigenbaum's requested instruction No. 28 is as follows:

"In determining whether a conspiracy existed, as charged in the indictment, and that the defendant Feigenbaum was a member of such conspiracy, I instruct you that you [406] cannot consider testimony of the acts or declarations of any other person, charged in the indictment with being a co-conspira-

tor with Feigenbaum, where such acts or declarations were done or made out of the presence of defendant Feigenbaum."

Defendant Feigenbaum's requested instruction No. 29 is as follows:

"In determining whether the conspiracy charged in the indictment existed and that Albert Feigenbaum was a member of such conspiracy you must reject and disregard all evidence and testimony in the case relating to anything said or done, out of the presence of defendant Feigenbaum, by the defendants Goldsmith, Blumenthal, Weiss and Abel."

The defendant Abel's requested instructions numbered 1, 8, 13, 23, 24, 25, 26, 27 and 28, are respectively, as follows: [407]

INSTRUCTION No. 1

Subject: Directed Verdict.

The evidence in this case is insufficient to warrant the conviction of the defendant Louis Abel and you are, therefore, instructed to return a verdict of not guilty. [408]

INSTRUCTION No. 8

Subject: Suspicious Circumstances.

I charge you that you cannot convict the defendant Louis Abel on suspicious circumstances, no matter how strong the circumstances may be; nor should you return a verdict of guilty on mere conjecture or speculation.

Tingle v. U. S. 38 Fed. (2) 573

Reavis v. U. S. 93 Fed. (2) 307

Ching Wan et al, v. U. S. 35 Fed. (2) 665

Kassin v. U. S. 87 Fed. (2) 183 [409]

INSTRUCTION No. 13

Subject: Conspiracy.

A conspiracy to commit a crime is not likely to exist between strangers.

State v. Gadbais, 289 Iowa, 25. [410]

INSTRUCTION No. 23

The defendant Louis Abel is only on trial for the offense of conspiracy as set forth in the indictment. He is not on trial for the offense of either buying or selling whiskey in excess of or higher than the maximum price established by law: He is not on trial for the buying or selling of whiskey at all.

Submitted by Deft. Louis Abel. (Signed) Harry K. Wolff. (Signed) Sol A. Abrams, Attys. [411]

INSTRUCTION No. 24

The indictment in this case charges the defendant Abel with having conspired with Albert Feigenbaum, Lawrence B. Goldsmith, Samuel S. Weiss and Harry Blumenthal to unlawfully sell, at wholesale, certain Old Mister Boston Rocking Chair Whiskey in excess of and higher than the maximum price established by law. If you find from the evidence

that the defendant Abel merely purchased or agreed to purchase certain cases of Old Mister Boston Rocking Chair Whiskey from any other defendant in this case or that the defendant Abel merely acted as the servant or agent or for or on behalf of Norman Reinberg or others for the purpose of purchasing for them certain Old Mister Boston Rocking Chair Whiskey from one or more of the other defendants in this case, and if you further find that the said defendant Abel was not acting as the servant, agent or employee of any other defendant in this case and was not acting for or on behalf of any other defendant named in this case, for the purpose of selling said whiskey, then you must return a verdict herein finding the defendant not guilty. [412]

INSTRUCTION No. 25

If you find from the evidence in this case that the acts and conduct of the defendant Louis Abel amounted to no more than an action on his part to purchase, either for himself or for some other person, Old Mister Boston Rocking Chair Whiskey, and that he did so purchase said whiskey, then you must find that the defendant Abel was not a member of the conspiracy set forth and charged in the indictment and you must return a verdict herein finding the defendant Abel not guilty. [413]

INSTRUCTION No. 26

I instruct you that where a transaction consists on the one hand of the selling of an article that is

either prohibited by law or that is being sold in a manner that violates the law, and on the other hand by the purchase of such article by another person, then, under such circumstances, the buyer and the seller are not guilty of a conspiracy to sell such article. Therefore, if you find from the facts in this case that the transaction involved amounted on the one hand to some of the defendants, other than Abel agreeing to sell the whiskey described in the indictment at a price prohibited by law, and on the other hand that the defendant Abel merely agreed to purchase for himself or some other person, some of said whiskey at said price, then you must find that the defendant Abel was not a member of any conspiracy that had for its object the selling of said whiskey, he being merely a purchaser or agent for the purchaser thereof. Under such circumstances you must return a verdict finding the defendant Abel not guilty. [414]

INSTRUCTION No. 27

If you find from the evidence in this case that the defendant Abel did agree with a man named Reinberg or some other person to sell to either or both of such persons certain Old Mister Boston Rocking Chair Whiskey at a price in excess of the maximum price established by law, but if you also find that the defendant Abel had not agreed with any other defendant in this case to sell any Old Mister Boston Rocking Chair Whiskey at a price above that provided by law, then you must return a verdict herein finding the defendant Abel not guilty on the ground

that he was not a member of the conspiracy charged in the indictment. [415]

INSTRUCTION No. 28

If you find from the evidence that two, or more defendants in this case other than the defendant Abel had conspired and agreed together to sell said whiskey described in the indictment at a price in excess of that established by law, and that after the formation of such conspiracy the defendant Abel did do some act either individually or in conjunction with some other person, which act operated in furtherance of the objects of the prior conspiracy, but that in the doing of such act or acts the defendant Abel had no knowledge of the existence of any such conspiracy, then you must return a verdict finding the defendant Abel not guilty for the reason that he never became a member of the conspiracy as charged and set forth in the indictment:

Thereupon the jury retired to deliberate upon their verdict, and thereafter returned into court, and upon being asked by the court whether they had agreed upon a verdict, answered that they had agreed. Thereupon the following proceedings were had:

The Court: Will you hand it to the Deputy Marshal, please? Mr. Clerk, will you read the verdict, please?

The Clerk: Ladies and Gentlemen: Harken to your Verdict as it will stand recorded:

"We the jury find as to the defendant at bar as follows: Harry Blumenthal, guilty; Louis Abel, [416] guilty; Lawrence B. Goldsmith, guilty; Samuel S. Weiss, guilty; Albert Feigenbaum, guilty.

ETHEL L. FAIRBAIRN,
Foreman."

So say you all?

Thereupon the jurors answered in the affirmative.

To this verdict of the jury, counsel for the defendants and each of them then and there duly Excepted.

Thereupon the said Court pronounced judgment and sentence of fine and imprisonment upon each of the said defendants, to which said sentence and judgment the said defendants, and each of them, duly Excepted, all of which from the record on file in the office of the Clerk of this Court fully and at large appears.

Thereafter the defendants and each of them, other than the defendant Weiss, by and through their respective counsel, and the defendant Weiss in his own proper person, made and argued their several motions for a new trial, and their several motions in arrest of judgment, all of which from the record and proceedings in the cause entitled as above fully and at large appears. The court denied the said motions of the said defendants and of each of them, to which rulings of the court each of the said defendants duly Excepted.

Thereafter and within due and legal time, the said defendants and each of them duly appealed

from the judgment aforesaid to the United States Circuit Court of Appeals for the Ninth Circuit, and filed their several notices of appeal herein, as from the record of this honorable court [417] in the cause entitled as above fully and at large appears.

And Now, and within due and legal time, and within the time allowed by law and by the order of this honorable court, the said defendants, and each of them, respectfully present this, their Bill of Exceptions, to be used upon their several appeals to the said United States Circuit Court of Appeals for the Ninth Circuit, and pray that the said bill be settled, approved and allowed by the honorable the District Judge who presided at the trial of the above entitled cause, and that as settled, the said bill be made a part of the record upon the appeals aforesaid.

**CERTIFICATE OF TRIAL JUDGE TO
BILL OF EXCEPTIONS**

To the end that the matters and things aforesaid may be and remain of record herein, the foregoing Bill of Exceptions is hereby settled, approved and allowed as containing the full substance of all the evidence and proceedings taken and had upon the trial of the above entitled cause, and as being in all particulars full, true and correct.

Dated August 28th, 1945.

(Signed) LOUIS E. GOODMAN

United States District Judge.

**STIPULATION RE SETTLING OF BILL OF
EXCEPTIONS, ETC.**

It is hereby stipulated and agreed by and between the respective parties hereto that the foregoing bill of exceptions on behalf of the defendants on appeal herein to the United States Circuit Court of Appeals, in and for the Ninth Circuit, has been duly presented within the time allowed by law and the rules and orders of this court, and that the same is in proper form and conforms to the truth and sets forth all of the evidence and all of the proceedings relating to the trial of said defendants and that it may be settled, allowed, signed, and authenticated by the United States District Court and the Judge thereof as the true bill of exceptions on behalf of said defendants and that it may be made a part of the record in this case.

Dated at San Francisco, California, August 28, 1945.

LEO R. FRIEDMAN

Attorney for Defendant
Feigenbaum

MORRIS OPPENHEIM

Attorney for Defendant
Blumenthal

GEORGE OLSHAUSEN

Attorney for Defendant Abel

WALTER H. DUANE

ARTHUR B. DUNNE

Attorneys for Defendant
Goldsmith

United States of America

417

SAMUEL S. WEISS

In Propria Persona

FRANK J. HENNESSY,

United States Attorney

By REYNOLD H. COLVIN

Deputy [419]

Receipt of copy of the foregoing Bill of Exceptions is hereby admitted this 3rd day of July, 1945.

(Signed) **FRANK J. HENNESSY**

U. S. Attorney

By T. SOLOMON

[Endorsed]: Filed Aug. 28, 1945. [420]

[Title of Court and Cause.]

**STIPULATION AND ORDER RELATIVE
TO EXHIBITS ON APPEAL**

It is hereby stipulated by and between the attorneys for the United States and the defendant and appellants above named that all exhibits introduced in evidence at the trial of the above entitled cause and now in the custody of the Clerk of the above entitled Court need not be set forth in the bill of exceptions of defendants but shall be deemed to be included therein as a part of said bill of exceptions with the same effect in all respects as if incorporated in and set forth in said bill of exceptions.

It is further Stipulated that all said exhibits be, together with the record on appeal, transmitted by

the Clerk of the above entitled court to and filed in the Office of the Clerk of the United States Circuit Court of Appeals for the [421] Ninth Circuit.

It is further Stipulated that such of said exhibits that either of the parties to the above action may deem material may be printed in the brief or briefs of such party or parties or in an appendix or supplement thereto with like force and effect as if said exhibits were set forth in full in said bill of exceptions.

Dated: July 19, 1945.

THOS. J. RIORDAN

Attorney for Defendant
Blumenthal

WALTER DUANE

ARTHUR B. DUNNE

Attorney for Defendant
Goldsmith

GEORGE OLSHAUSEN

Attorney for Defendant Abel

LEO R. FRIEDMAN

Attorney for Defendant
Feigenbaum

SAMUEL S. WEISS

In Propria Persona

FRANK J. HENNESSY

United States Attorney

By **R. H. COLVIN**

Assistant United States
Attorney

ORDER

The foregoing stipulation is hereby approved and it is so ordered accordingly..

Dated: July 23, 1945.

LOUIS E. GOODMAN

United States District Judge.

[Endorsed]: Filed July 24, 1945. [422]

[Title of Court and Cause.]

PRAECIPE FOR RECORD

On Appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Clerk of Said District Court:

Kindly furnish the following papers, to be used on the appeals of the defendants in the above entitled [423] action to the United States Circuit Court of Appeals for the Ninth Circuit:

1. The caption.
2. The names and addresses of counsel.
3. The Indictment.
4. All Demurrers to the Indictment.
5. All motions to Quash the Indictment.
6. All minutes of proceedings on demurrers of the several defendants to said Indictment.
7. All proceedings on motions to Quash Indictment.

8. All minutes of orders over-ruling demurrers to Indictment and denying motions to quash indictment.

9. All minutes of the Pleas of the several defendants to Indictment.

10. All minutes of Trial.

11. The Verdict of the Jury.

12. The several Motions of the Defendants for a New Trial.

13. All Motions in arrest of Judgment.

14. The orders denying the several motions for a new trial.

15. The orders denying the several motions in arrest of Judgment.

16. The motion of the defendant Blumenthal for a Directed Verdict.

17. The Order denying the last-mentioned Motion.

18. The Judgment and Sentences.

19. The several notices of appeal filed by each of the several Defendants.

20. The engrossed and settled Bill of Exceptions.

21. The several assignments of errors severally filed by each of the said defendants. [424]

22. The Praeceptum.

23. The Certificate of the Clerk to the Transcript.

24. Order and stipulation relative to exhibits.

Dated: September 20, 1945.

MORRIS OPPENHEIM

Attorney for Defendant

Harry Blumenthal

GEORGE G. OLSHAUSEN

Attorney for Defendant Louis

Abel

ARTHUR B. DUNNE

WALTER H. DUANE

Attorneys for Defendant

Lawrence B. Goldsmith

LEO R. FRIEDMAN

Attorney for Defendant

Albert Feigenbaum

S. S. WEISS

Defendant in propria persona

(Acknowledgment of Service.)

[Endorsed]: Filed Sept. 20, 1945. [425]

District Court of the United States,

Northern District of California

**CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL**

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 425 pages, numbered from 1 to 425, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of United States of Amer-

ica vs. Harry Blumenthal, Louis Abel, Lawrence B. Goldsmith, Samuel S. Weiss and Albert Feigenbaum, Defendants, No. 29238 G, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$20.30 and that the said amount has been paid to me by the Attorneys for the appellants herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 22nd day of December, A.D. 1945.

[Seal]

C. W. CALBREATH,

Clerk

M. E. VAN BUREN

Deputy Clerk [426]

[Endorsed]: No. 11232. United States Circuit Court of Appeals for the Ninth Circuit. Harry Blumenthal, Louis Abel, Lawrence B. Goldsmith, Samuel S. Weiss and Albert Feigenbaum, Appellants, vs. United States of America, Appellee. Transcript of Record. Upon Appeals from the District Court of the United States for the Northern District of California, Southern Division.

Filed January 18, 1946.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth District

No. 11232

HARRY BLUMENTHAL, LOUIS ABEL, LAW-
RENCE C. GOLDSMITH, SAMUEL S.
WEISS, and ALBERT FEIGENBAUM,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

STATEMENT OF POINTS ON WHICH LAW-
RENCE C. GOLDSMITH, APPELLANT,
INTENDS TO RELY AND DESIGNATION
OF RECORD ON APPEAL

Comes Now, Lawrence C. Goldsmith, appellant herein, by his attorneys Arthur B. Dunne and Walter H. Duane and files herein his Statement of Points on Which He Intends to Rely upon Appeal and Designation of Record on Appeal.

Lawrence C. Goldsmith, appellant herein, states that he intends to rely upon the assignment of errors heretofore filed, and which is incorporated herein as if set forth in full, and herein states that he will rely upon all of the assignment of errors therein stated.

Lawrence C. Goldsmith, appellant, herein designates the entire transcript of the record and proceedings in the United States District Court, for the Northern District of California, Southern Di-

vision and numbered Number 29238 G in said Court to be printed, except that the original exhibits introduced in said trial court are not to be printed; said exhibits, pursuant to stipulation filed herein, are to be considered in their original form.

ARTHUR B. DUNNE

WALTER H. DUANE

Attorneys for Lawrence C.

Goldsmith, Appellant

Service of a copy of the above is hereby admitted
this 28 day of January, 1946.

FRANK J. HENNESSY

United States Attorney

By REYNOLD H. COLVIN

Assistant United States

Attorney

[Endorsed]: Filed January 28, 1946. Paul P.
O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

**STIPULATION AND ORDER RELATIVE TO
TRANSCRIPT OF RECORD AND TO
ORIGINAL EXHIBITS**

It is hereby stipulated that the original exhibits, introduced in the trial of the above cause in the United States District Court for the Northern District of California, Southern Division, and numbered No. 29,238-G in said Court, all said exhibits being now in file with this Court in this cause together with the certified transcript of record of said proceedings in said District Court, need not be reproduced or printed but may be considered in their original form and with like force and effect as if said exhibits were reproduced or printed in said transcript.

It is further stipulated that any of the parties hereto may make reference to said exhibits in its briefs filed or to be filed herein in all respects as though said exhibits had been reproduced or printed in said transcript.

It is further stipulated that should any of the parties hereto so desire said party may print any exhibit in its brief or briefs filed or to be filed herein or in any appendix or supplement to said brief in all respects as though said exhibits had been reproduced and printed in said transcript.

Dated: January 24th, 1946.

MORRIS OPPENHEIM

Attorney for Defendant
Blumenthal

ARTHUR B. DUNNE

WALTER H. DUANE

Attorneys for Defendant
Goldsmith

GEORGE G. OLSHAUSEN

Attorney for Defendant Abel

LEO R. FRIEDMAN

Attorney for Defendant
Feigenbaum

SAMUEL S. WEISS

In Propria Persona

FRANK J. HENNESSY

United States Attorney

By **REYNOLD H. COLVIN**

Assistant United States
Attorney

ORDER

The foregoing stipulation is hereby approved and
it is so ordered.

FRANCIS A. GARRECHT

Circuit Judge

[Endorsed]: Filed January 29, 1946. Paul P.
O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

**ALBERT FEIGENBAUM'S STATEMENT OF
POINTS ON WHICH HE INTENDS TO
RELY ON APPEAL AND DESIGNATION
OF RECORD ON APPEAL.**

Comes now Albert Feigenbaum, one of the appellants above named, and advises the court that on his appeal he intends to rely on each and all of the points specified as errors in his assignment of errors heretofore filed, special reference to said assignment of errors being hereby made and by said reference incorporated herein.

Said appellant designates the entire record be printed in that he believes that the same is necessary to fully support and present his position on appeal.

Dated: February 6, 1946.

(Signed) LEO R. FRIEDMAN

Attorney for Albert Feigen-
baum

[Endorsed]: Filed February 16, 1946. Paul P. O'Brien, Clerk.

No. 11232

**IN THE
United States Circuit Court of Appeals
For the Ninth Circuit**

**HARRY BLUMENTHAL, LOUIS ABEL,
LAWRENCE B. GOLDSMITH, SAMUEL
S. WEISS and ALBERT FEIGENBAUM,**
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

**Upon Appeals from the District Court of the United States
for the Northern District of California,
Southern Division**

**PROCEEDINGS HAD IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT**

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of
Monday, October 14, 1947

Before: Denman, Healy and Bone, Circuit Judges.

[Title of Cause.]

ORDER OF SUBMISSION

Ordered appeals herein argued by Mr. Arthur B. Dunne, counsel for appellant Goldsmith; by Mr. Leo R. Friedman, counsel for appellant Feigenbaum; by Mr. Morris Oppenheim, for appellant Blumenthal; by Mr. George Olshausen, for appellant Abel, and by Mr. Samuel S. Weis, in propria persona, and by Mr. Reynold H. Colvin, Assistant United Attorney, counsel for appellee, and submitted to the court for consideration and decision.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of
Monday, December 16, 1946

Before: Denman, Healy and Bone, Circuit Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION
AND FILING AND RECORDING OF
JUDGMENT

Ordered that the typewritten opinion this day rendered by this Court in above cause be forth-

with filed by the clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion rendered.

In the United States Circuit Court of
Appeals for the Ninth Circuit

No. 11,232

Dec. 16, 1946

HARRY BLUMENTHAL, LOUIS ABEL,
LAWRENCE B. GOLDSMITH, SAMUEL
S. WEISS and ALBERT FEIGENBAUM,
Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeals from the District Court of the
United States for the Northern District
of California, Southern Division

Before: Denman, Healy and Bone, Circuit Judges
Bone, Circuit Judge:

OPINION

Appellants appeal from a conviction before a jury upon an indictment charging them, in one count, with the crime of conspiring to violate the Emergency Price Control Act and Regulations by wilfully selling whisky at over-ceiling prices. Omitting formalities, the indictment reads as follows:

"That Harry Blumenthal, Louis Abel, Lawrence B. Goldsmith, Samuel S. Weiss, and Al-

bert Feigenbaum, (hereinafter called 'said defendant') at a time and place to said Grand Jurors unknown, did knowingly, wilfully, unlawfully, corruptly, and feloniously conspire, combine, confederate, arrange, and agree together and with divers other persons, whose names are to the Grand Jurors unknown, to commit offenses against the United States of America and the laws thereof, the offenses being to knowingly, wilfully and unlawfully sell at wholesale certain distilled spirits, to-wit, Old Mr. Boston Rocking Chair Whiskey, in excess of and higher than the maximum price established by law, said maximum price at wholesale then and there being not in excess of \$25.27 per case of twelve bottles, each of said twelve bottles containing one-fifth of one gallon of said Old Mr. Boston Rocking Chair Whiskey, in violation of Section 902(a), 904(a), and 925(b) of Title 50 U.S.C.A. App., and Office of Price Administration Regulations: Maximum Price Regulation 193 and Maximum Price Regulation 445.

"And the said Grand Jurors, upon their oaths aforesaid, do further charge and present: That in pursuance of, and in furtherance of, in execution of, and for the purpose of carrying out, and to effect the object and design and purposes of said conspiracy, combination, confederation, and agreement aforesaid, the hereinafter named defendants did, at the times here-

inafter set forth, commit the following overt acts within the Southern Division of the Northern District of California and within the jurisdiction of this Court: [followed by a recital of alleged overt acts.]”

Appellants assail this indictment on the ground that a conspiracy or agreement to violate a regulation of the Price Administration is specially punishable under the provisions of the Emergency Price Control Act itself as a misdemeanor and therefore cannot be punished as a felony under the general conspiracy statute. They argue that when Congress provided that it should be unlawful to agree to sell or deliver any commodity in violation of any regulation imposed by the Price Administrator, it thereby made a conspiracy to violate a price regulation punishable specially and exclusively as provided in Section 925(b) of the Price Control Act and, therefore, no prosecution would lie under the general conspiracy statute, U.S.C.A. Title 18, Section 88. It is contended that it was the purpose of Congress to do away, in prosecutions under the Price Control Act, with the harsh rule that a conspiracy to commit a misdemeanor is a felony.

The contention lacks merit. The manifest purpose of Congress in enacting the Emergency Price Control Act was to compel compliance with price regulations authorized under the statute. As pointed out in *Kraus & Bros. v. United States*, 327 U. S. 614, 620, 621, criminal liability attaches to any one who wilfully sells commodities in violation of a

regulation or order of the Price Administrator establishing maximum prices. Congress forbade and made punishable an agreement to violate the act, and from this appellants conclude that the conspiracy statute (Title 18 U.S.C.A. 88) was impliedly repealed or superseded by Congress to the extent that it does not apply to conspiracies to violate the Emergency Price Control Act and regulations promulgated thereunder.

We do not agree with this contention. The conspiracy statute includes as a necessary element the commission of an overt act. There is no mention of the overt act in pursuance of the agreement alluded to in the Emergency Price Control Act and we conclude that there is a clear and striking distinction between the mere agreement punishable as a misdemeanor, and the agreement plus an overt act within the purview of the felony statute.

Prosecutions based upon indictments for conspiracies to violate the Emergency Price Control Act have been upheld in *Newman v. United States* (CCA-9), 156 F. 2d 8; *Old Monastery Co. v. United States* (CCA-4), 147 F. 2d 905; *United States v. Renken* (D.C. S.C. 1944), 55 F. Supp. 1; *United States v. Krupnick* (D.C. N.J. 1943), 51 F. Supp. 982; *United States v. Armour & Co. of Delaware* (D.C. Mass., 1943), 50 F. Supp. 347. Furthermore, there has been a long and consistent recognition that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses, and the power of Congress to separate the

two and to affix to each a different penalty is well established. A conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy. See *Pinkerton v. United States*; *American Tobacco Co. v. United States*, Supreme Court, both decided June 10, 1946. See also *Old Monastery Co. v. United States*, *supra*.

On principle and from these authorities, we hold that a conspiracy to violate the Emergency Price Control Act and regulation promulgated thereunder is indictable as a separate and distinct offense.

There was evidence in this case from which the jury could properly have inferred beyond a reasonable doubt:—That Goldsmith operated a wholesale liquor business in San Francisco, California known as the Francisco Distributing Company (hereafter called Francisco) and Weiss was his sales manager; that in December of 1943, two carloads of whiskey (the whisky referred to in the indictment) were received and recorded as purchased by Francisco though exactly who owned the whisky was not established; that this whisky was cased in cases of twelve bottles, each bottle containing one-fifth gallon; that during the months of December of 1943 and January of 1944, and while this whisky was held by Francisco, Abel, Blumenthal and Feigenbaum personally made sales therefrom of cases of whisky at wholesale to various persons, such sales being in lots of from 25 to 200 cases; that when such sales were made, the facilities of Francisco were thereupon used by them for the purpose

of clearing such sales through the books of Francisco with the knowledge and cooperation of Goldsmith and Weiss; that for this particular service Goldsmith and Weiss received two dollars per case which they divided between themselves; that upon the making of such sales by Abel, Blumenthal and Feigenbaum, the whisky was invoiced and billed to each of their customers by Francisco and delivery effected to these customers through Francisco; that such invoices were required by state law to be issued from a legitimate wholesale liquor firm so that their records, as purchasers of whisky, could be properly kept to comply with this law; that Abel, Blumenthal and Feigenbaum were not engaged in business as wholesale liquor dealers and none of them held a basic permit as a wholesaler of liquor; that Abel, Blumenthal and Feigenbaum shared in a common access to the stock or "pool" of whisky so held by Francisco, and each of them was free to and did make sales therefrom to liquor vendors and the liquor so sold by them was thereafter delivered to their customers through Francisco; that in each of these sales the liquor was billed to customers of Abel, Blumenthal and Feigenbaum by Francisco at \$24.50 per case and checks for this amount were given to Francisco; that in each sale so made by Abel, Blumenthal and Feigenbaum, each of them demanded and received a side-money payment from the customer to whom they sold whisky, which side-money payment, when added to the ostensible sale price of \$24.50 per case, brought the price to these customers of Abel, Blumenthal and

Feigenbaum within the range \$55-\$65 per case; that when the checks to Francisco were cleared through its books and the side-money payments collected by Abel, Blumenthal and Feigenbaum, the whisky was delivered by Francisco to these purchasers; that under the Emergency Price Control Act and applicable regulations the authorized wholesale ceiling price on this whiskey was \$25.27 per case at the time these sales were made in the months of December of 1943 and January of 1944.

Appellants vigorously contend that while certain overt acts were shown by the evidence, which might have indicated isolated offenses by individual appellants and punishable as such under the Price Control Act, the evidence was insufficient to show a conspiracy on the part of appellants to commit such offenses. They argue that even though the evidence may have established to the satisfaction of the jury, beyond a reasonable doubt, the truth of the facts as outlined above, nevertheless this proof falls short of creating the necessary inference of guilt legally sufficient to link appellants together as conspirators who had agreed together on a common plan or purpose to do the things shown by the evidence and thereafter engaged in acts designed and intended to carry this plan into execution; that this evidence failed to show (except in some instances) that appellants were acquainted with one another; that it showed only an identity of results rather than an identity of purpose and the latter must be shown in order to establish the existence of a conspiracy; that while

Abel, Blumenthal and Feigenbaum were all conducting the same kind of transaction, no connection was shown between them other than that Goldsmith was the central distributing point from which the whisky was procured; that the independent sales shown to have been made by Abel, Blumenthal and Feigenbaum (and by certain other unknown and unnamed salesmen whose transactions were made to appear in the evidence) present a situation identical to that presented in *United States v. Kotteakus*, (decided June 10, 1946, Supreme Court) in that the evidence showed several distinct transactions participated in by separate and distinct parties, the only "nexus" among them being in the fact that Goldsmith participated in all.

We cannot agree with these contentions. If the jury was convinced beyond a reasonable doubt that the facts and circumstances revealed by the evidence were true, then the jury was justified in inferring that appellants were parties to a single agreement and conspiracy to commit the offenses charged in the indictment and that the overt acts established in the evidence were done and performed by appellants to further and carry into execution the objects and purposes of this conspiracy.

It is true, as argued, that when one conspiracy is charged, proof showing only different and disconnected smaller ones will not sustain conviction, and proof of crime committed by one or more of the defendants, wholly apart from and without relation to others conspiring to do the thing forbidden, will

not sustain conviction. But, as herein indicated, the jury in this case was not confronted with that sort of situation. Here the evidence tended to prove, not a multitude of isolated conspiracies but a single general conspiracy in which the accused cooperated toward the same common end.

Appellants contend that the lower court erred in admitting in evidence certain sales of whisky by Abel, Blumenthal and Feigenbaum to purchasers from them, without first having proved that appellants took part in a conspiracy, that is, until the *corpus delicti* was proved. But the *corpus delicti* itself may be shown to exist by overt acts such as an exchange of words, circumstances and events showing a course of dealings. Any or all of these may provide the basis from which the existence of the conspiracy might be inferred by the jury. Commission of the overt acts may constitute the best proof of the conspiracy and such evidence is often used for that purpose.¹

An overt act need not be in itself a criminal act,² nor the very crime that is the object of the con-

¹Marino v. U.S., 91 F. 2d 691, 698, 9-CCA, cert. den. 302 U. S. 764; Stack v. U. S., 27 F. 2d 16, 17, 9-CCA; Fisher v. U. S., 2 F. 2d 843, 846; Hoepfel v. U. S., 85 F. 2d 237, 242; Rose v. U. S., 149 F. 2d 755, 759, 9-CCA; American Tobacco Co. v. U. S., 147 F. 2d 93, 107; Glasser v. U. S., 315 U. S. 60; American Tobacco Co. v. U. S., (Supreme Court) decided June 10, 1946; McDonald v. U. C., 133 F. 2d 23.

²Rose v. U. S., *supra*; U. S. v. Rabinowich, *supra*; Marino v. U. S., *supra* (see note 10 in case).

spiracy. *United States v. Rabinowich*, 238 U. S. 78, 86; *Pierce v. United States*, 252 U. S. 239, 244. It is sufficient that the overt act should accompany or follow the agreement and it must be done in furtherance of the object of it. See *Marino v. United States*, *supra*, notes 12 and 13 in reported case.

In this case the Government relied on circumstantial evidence to show the existence of the conspiracy. The claimed offense is one which from its very nature can rarely be proved by direct evidence. Ordinarily only the results of a conspiracy, and not the private plottings, are observed. Like any other issue of fact conspiracy may be proved by circumstantial evidence. *Rose v. United States*, *supra*. To constitute an unlawful conspiracy no formal agreement is necessary. *Lawlor v. Loewe*, 235 U. S. 522; *American Tobacco v. United States* (Supreme Court, footnote 1). The crime is almost always a matter of inference deduced from the acts of the persons accused, which are done in pursuance of an apparent criminal purpose. *Pearlman v. United States*, 20 F. 2d 113, 114 (cert. den. 275 U. S. 549); *Oliver v. United States*, 121 F. 2d 245, 249; *American Tobacco v. United States*, 147 F. 2d 93, 107. The proof need go no further than reach that degree of probability where the general experience of men suggests that it has passed the mark of reasonable doubt. *Rose v. United States*, *supra*.

Here the circumstances support the inference of a common design. The transaction was coherent, followed by a consistent pattern, and extended over a

relatively brief period of time. It involved quite simply the acquisition of a single large lot of whisky and its sale ostensibly at a uniform below-ceiling price per case to be paid by check, plus the exaction in cash of side-payments as heavy as the traffic would bear; hence the use of solicitors in what was peculiarly a seller's market. Each of the accused men appears as a cog in an enterprise bearing throughout the earmarks of a premeditated scheme in which each actor was to play his appointed role. Superficially all is made to appear regular while beneath the surface the law is flouted to the profit of the participants. To say that there is here no evidence of a conspiracy among the several actors is to deny the lessons of experience.

Furthermore, the order in which evidence to prove the corpus delicti is to be received is largely a matter within the discretion of the trial court. The logical sequence of events—from agreement in a common purpose to perpetuation of an act designed to carry it out—does not require that introduction of the evidence must follow the same rigorous sequence. As pointed out above, commission of an overt act may, in itself, constitute the best proof of the conspiracy. The rule in this circuit is clearly indicated in *Stack v. United States*, *supra*; *Marino v. United States*, *supra*; *Rose v. United States*, *supra* and *Gros v. United States*, 138 F. 2d 261. See also *Hoeppel v. United States*, *supra* and *McDonald v. United States*, 133 F. 2d 23.

Appellants also contend that the lawful and proper wholesale ceiling price of the whisky was not established by the evidence. They challenge the application at the trial of Maximum Price Regulation 193, Order No. 5 thereunder, and Maximum Price Regulation 445 to determine the lawful wholesale ceiling price of \$25.27 per case on the whisky sold by appellants, and they further contend that Maximum Price Regulation 445 has no application because it was not in effect at the time of the sales.

These contentions are without merit. We find that Maximum Price Regulation 445 was in effect during all of the period covered by the charge in the indictment. Further, that the formula prescribed and required to be applied under these regulations to determine the proper and lawful wholesale ceiling price of \$25.27 per case was clearly expressed by the Price Administrator and the dividing line between unlawful evasion and lawful action was not left to conjecture. The lawful price can be clearly ascertained from the regulations and it was properly applied by the lower court in its instructions to the jury.

It is also urged by appellants that these regulations are void because their requirements are so vague, indefinite and uncertain that the wit of man is incapable of understanding them. We disagree. The challenged regulations are free from the claimed infirmities. It is significant that the records required to be kept on sales of whisky referred to in the indictment were made to show an invoiced whole-

sale price (not including the illegally collected "side-payments") of \$24.50 per case. The adoption and use of this "wholesale price" on such sales records revealed a knowledge and understanding of the wholesale price requirements of the applicable regulations sufficient to present to the jury a clear inference that the studied purpose of the appellant-sellers was to make this invoice price come within the lawful wholesale ceiling price of \$25.27 per case in order that such recorded sales would appear to conform to the price requirements of the very regulations and the order which appellants here characterize and denounce as being so vague and uncertain, as to be incomprehensible.

Appellants also assert the invalidity of the regulations. The same argument was asserted in *Old Monastery v. United States*, *supra*. The same regulations were there involved and the court found no merit in the contention. The *Yakus* case (321 U. S. 414) lays at rest the question of appellants' right to attack the validity of such regulations in this proceeding. There is an adequate separate procedure available for the adjudication of the validity of administrative regulations when questioned, even in criminal cases. The record shows no attempt by appellants to employ the procedure referred to in the *Yakus* case, and in view of the rule there laid down, we hold that appellants' challenge to the validity of the regulations and Order No. 5 cannot here be considered.

The contention that the evidence showed that ap-

pellants who sold the whisky were "finders" for the purchasers is without merit. The evidence clearly permitted a convincing inference to the contrary and it satisfied the jury, beyond a reasonable doubt, that where sales were established as having been made by Abel, Blumenthal and Feigenbaum to certain buyers from them, they were sellers in these transactions and not "buying agents" for these purchasers.

One Harkins, a special investigator for the Alcohol Tax Unit of the Treasury Department, testified concerning the details of an interview he had with Goldsmith and his sales manager, Weiss, during January of 1944. (Harkins appears to have had a later interview with these two appellants in September of 1944 regarding the same matter.) He had been checking on the sales of the whisky here involved. In these conversations, these appellants told Harkins ~~of the receipt by them of the two carloads of whisky~~ and stated to him that they had received a fee of \$2 a case for clearing the whisky through the books of the Francisco.

Objection was made by appellants to the Harkins testimony on the ground that it was not binding on any of them except Goldsmith and Weiss; that the September interview was after the conclusion of the alleged conspiracy and was a narrative of past events; that it was hearsay, and that the corpus delicti had not been established. At the conclusion of the testimony, the court instructed the jury that the statements made by Goldsmith and Weiss to Hark-

ins could only be considered as against Goldsmith and Weiss. The instruction was proper. *Chevillard v. United States*, 155 F. 2d 929, 9-CCA.

Aside from the Harkins testimony directly affecting the activities of Goldsmith and Weiss, there was ample evidence of active participation in the conspiracy charged to sustain, beyond a reasonable doubt, an inference of guilt of Abel, Blumenthal and Feigenbaum, the other three appellants. This evidence also fully sustains the inference that the sales of whisky by Abel, Blumenthal and Feigenbaum were made by them and delivery to their customers accomplished by means of the cooperation and participation of Goldsmith and Weiss in this sales scheme. Such a conclusion is clearly supported by reasonable inferences to be drawn from the evidence.

Another contention is that since the court below admitted the testimony of each witness against only a particular defendant with whom he dealt, and awaited the motion of the Government at the close of its case to admit all of the testimony against all of the defendants³ upon the ground that a conspiracy had been established among them, they were deprived of the right of cross-examination—this because they could not cross-examine at the time of such limited admission without waiving its limitation. They argue that this situation gave them no

³This motion was granted except with respect to the testimony of Harkins which was admitted only against Goldsmith and Weiss.

opportunity to cross-examine later in the trial and prior to the granting of the Government's motion. The record does not support them in this contention. Their objections at trial reveal no protest against a deprivation of the claimed right. No demand to cross-examine was made at the time of the granting of the Government's motion. See *Levine v. United States*, 79 F. 2d 364, 368, 9-CCA.

An exception was noted by appellants to that portion of the charge to the jury which informed the jury that in every crime there must exist a union or joint operation of act and intent, and for conviction both elements must be proved to a moral certainty and beyond a reasonable doubt; that such intent is merely the purpose or willingness to commit such an act; that a person is presumed to intend to do all that which he voluntarily and wilfully does in fact do, and must also be presumed to intend all the natural, probable and usual consequences of all his acts.

We find nothing objectionable in this instruction. See *United States v. General Motors*, 121 F. 2d 376, at 402; *Gates v. United States*, 122 F. 2d 571, 575.

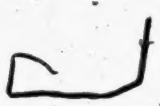
We have examined this record with care to assure ourselves that substantial rights of appellants (who did not testify) have not been invaded by the wrongful admission of evidence and by the instructions to the jury. The instructions adequately informed the jury concerning the weight to be given circumstantial evidence and the necessity of receiving with caution the testimony of an accomplice or co-con-

spirator; the quantum and character of proof necessary to establish the existence of a conspiracy; the element of reasonable doubt regarding the guilt of any one of the appellants, and the necessity of applying the rule of reasonable doubt to every material element of the events charged in the indictment. The rule of proof as to the establishment of the commission of overt acts was properly stated. From our examination we are satisfied that the instructions, taken as a whole, correctly presented the law to the jury.

The evidence admitted in this case supports the verdict. It convinced the jury beyond a reasonable doubt that appellants were active participants in a single conspiracy the purpose and result of which was the deliberate use of the black-market side-payment device to violate the Emergency Price Control Act.

Affirmed.

(Endorsed:) Opinion. Filed Dec. 16, 1946. Paul P. O'Brien, Clerk.



In the United States Circuit Court of Appeals for
the Ninth Circuit

No. 11,232

HARRY BLUMENTHAL, LOUIS ABEL,
LAWRENCE B. GOLDSMITH, SAMUEL S.
WEISS and ALBERT FEIGENBAUM,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

ORDER

On Petition for Rehearing

Before: Denman, Healy and Bone, Circuit Judges

The petition for rehearing is denied.

WILLIAM HEALY,
United States Circuit Judge.

HOMER T. BONE,
United States Circuit Judge.

Denman, Circuit Judge, dissenting:

The petition for rehearing should be granted and the judgments reversed. My concurrence in the decision is withdrawn and the accompanying opinion filed as a dissent to the court's opinion filed on December 16, 1946.

(Endorsed:) Order denying petition for rehearing, and Dissenting Memorandum of Denman, C.J. Filed February 28, 1947. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DISSENTING OPINION

Upon Appeals from the District Court of the United States for the Northern District of California, Southern Division

Before: Denman, Healy and Bone, Circuit Judges
Denman, Circuit Judge, dissenting from
opinion of the court filed herein on December 16, 1946:

The statement of facts of the court's opinion has a fatal vacuum necessary to be filled to establish the conspiracy charged, though its circumstantial evidence warrants the inference of at least four other disconnected criminal conspiracies.

Abel, Blumenthal and Feigenbaum are shown to have been black marketers and should have been prosecuted for selling whisky at over ceiling prices. Instead, the several prosecutions are sought to be avoided by attempting to throw a conspiracy net around them—a convenience to prosecutors but often dangerous to the cause of justice. Cf. *Kotteakos v. United States*, 328 U. S. ..., 90 L. ed. 1178, 1183.

The court's opinion is bare of facts, as is the evidence,

(1) That any of these three knew or was in any communication with any others of them;

(2) That any knew that any other obtained whisky from the defendants Goldsmith and Weiss;

(3) That any of the three sellers knew that any other of them bought the whiskey from the so-called

"common pool" of whiskey in the warehouse—a common pool only in the sense that each separately obtained his whiskey from it, but not a pool of which any of the three had common knowledge that any other of them had obtained his whiskey from it;

(4) That any knew that any other bought his whiskey at the same below-ceiling price;

(5) That any knew that any other sold his whiskey at the same or similar over-ceiling prices.

The obvious inference from the above proof and absence of other proof is that the unknown owner of the whiskey referred to in the court's opinion used each of Abel, Blumenthal and Feigenbaum separately as his agent to violate the law. This would constitute several separate conspiracies between the unproved owner and each of the proved sellers, but not a conspiracy among all four of them.

The owner is the common hub from which extend the three illicit sale conspiracies as spokes, but with no binding rim, as in the cases of *Kotteakos v. United States*, 328 U. S. . . , 90 L. ed. 1178, 1181, and *Canella v. United States*, 157 F. 2d 470, 477.

Even if the circumstantial evidence of identity of purchase and sale price also warranted the more remote inference that each of these three sellers conspired with each other and the owner to violate the price ceiling, the first and obvious inference, of three separate agencies for the owner, must control. As we stated in reversing an instruction which failed to state that the inferences from circumstan-

tial evidence must be "inconsistent with every reasonable hypothesis of innocence," of the crime charged. *Paddock v. United States*, (CCA-9) 79 F. 2d 872, 875, 876.

"These instructions were erroneous. The rule with reference to the consideration of circumstantial evidence by the jury is thoroughly settled. This rule in brief is that the circumstances shown must not only be consistent with guilt, but inconsistent with every reasonable hypothesis of innocence. 2 *Brickwood Sackett Instructions to Juries*, § 2491, et seq. We have said that this well-settled instruction in regard to the degree of proof required where circumstantial evidence is relied upon is merely another statement of the doctrine of reasonable doubt as applied to circumstantial evidence. It may therefore be true that 'no greater degree of certainty is required when circumstantial evidence is relied upon than where direct evidence is relied upon,' as stated by the trial judge. The additional statement in the instruction that 'evidence about circumstances * * * must at all times be consistent with guilt only and inconsistent with innocence,' omits the qualifying and important phrase, 'inconsistent with every reasonable hypothesis of innocence,' and for that reason is an erroneous statement of the law."

The same is true also of the appellants Weiss and Goldsmith. The conspiracy charged is that they conspired with the three black marketers, Abel,

Blumenthal and Feigenbaum to sell the whiskey at higher than the maximum price. The court's opinion states no facts and the record has none showing that either Weiss or Goldsmith knew that any whiskey was sold at such higher prices, much less than there was any agreement with the three or any one of them for such prohibited sales.

There is evidence that Weiss and Goldsmith received \$2.00 per case to pass the whiskey through their books and to sell it at slightly less than the maximum price to cover up some unknown reason of the unknown owner. But this is fully capable of supporting an inference that the unknown owner has highjacked the whiskey and wanted it sold at something less than the maximum so that no question could be raised regarding its disposition. True this would be a wrongful conspiracy, but as in the *Kotteakos* case, not the conspiracy charged in the instant indictment. As in *Paddock v. United States*, supra, the inference from the circumstantial evidence of these wrongful acts involving sales at less than the maximum is one "inconsistent with . . . [a] reasonable hypothesis of innocence" of the charged conspiracy to sell at higher than the maximum price. As is stated in *Kotteakos v. United States*, supra; at page 1191,

"Criminal they may be, but it is not the criminality of mass conspiracy. They do not invite mass trial by their conduct. Nor does our system tolerate it. That way lies the drift toward totalitarian institutions. True, this may be in-

convenient for prosecution. But our Government is not one of mere convenience or efficiency. It too has a stake, with every citizen, in his being afforded our historic individual protections, including those surrounding criminal trials. About them we dare not become careless or complacent when that fashion has become rampant over the earth."

The judgments should have been reversed.

(Endorsed:) Dissenting Opinion of Denman, C.J. Filed February 28, 1947. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the
Ninth Circuit

No. 11232

HARRY BLUMENTHAL, et al.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

JUDGMENT

Upon appeal from the District Court of the United States for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Northern District of California, Southern Division and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgments of the said District Court in this Cause, be and, and each of them, hereby is affirmed.

[Endorsed]: Filed and entered December 16, 1946.
Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the
Ninth Circuit

Except from Proceedings of Friday,
February 28, 1947.

Before: Denman, Healy and Bone, Circuit Judges.

[Title of Cause.]

**ORDER DENYING PETITION FOR REHEAR-
ING, WITHDRAWING CONCURRENCE
AND FILING OF DISSENTING OPINION**

Upon consideration of the respective petitions of appellants Blumenthal, Abel, Goldsmith, Weiss and Feigenbaum, filed January 14, 1947, and within time allowed therefor by rule of court, for a rehearing of above cause, and by direction of Circuit Judges Healy and Bone, It is ordered that said petitions for rehearing, and each of them hereby is denied.

Circuit Judge Denman dissents from denial of the petitions for rehearing and withdraws his concurrence in the judgment of affirmance filed and entered on December 16, 1946, and directs that his dissenting opinion to the opinion of December 16, 1946, be forthwith filed by the clerk.

United States Circuit Court of Appeals for the
Ninth Circuit

[Title of Cause.]

**CERTIFICATE OF CLERK, U. S. CIRCUIT
COURT OF APPEALS FOR THE NINTH
CIRCUIT, TO RECORD CERTIFIED UN-
DER RULE 38 OF THE REVISED RULES
OF THE SUPREME COURT OF THE
UNITED STATES.**

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing Five Hundred Five (505) pages, numbered from and including 1 to and including 505, to be a full, true and correct copy of the entire record excluding original exhibits of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellants, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand the seal of the said United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 7th day of March, 1947.

[Seal]

PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1947

No. 54

ORDER ALLOWING CERTIORARI—Filed May 5, 1947

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted, and the case is consolidated with Goldsmith et al. vs. United States for argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1947

No. 55

LAWRENCE B. GOLDSMITH, Petitioner,

vs.

THE UNITED STATES OF AMERICA

ORDER ALLOWING CERTIORARI—Filed May 5, 1947

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted, and the case is consolidated with Blumenthal et al. vs. United States for argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ:

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1947

No. 56

ORDER ALLOWING CERTIORARI—Filed May 5, 1947

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted, and the case is consolidated with Blumenthal et al. vs. United States for argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1947

No. 57

ORDER ALLOWING CERTIORARI—Filed May 5, 1947

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted, and the case is consolidated with *Blumenthal et al. vs. United States* for argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(1394)